SQA Builders Sdn Bhd v Luxor Holdings Sdn Bhd & Anor and other cases

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NOS BA-24C(ARB)-8–08 OF 2021, BA-24C(ARB)-9–09 OF 2021, BA-24C(ARB)-10–09 OF 2021 AND BA-24C(ARB)-14–12 OF 2021
WONG KIAN KHEONG J
28 FEBRUARY 2023

Arbitration — Award — Enforcement — Non-payment for work done — Adjudication decision ordering for payment of adjudicated amounts set aside by Court of Appeal — Parties referred matter to arbitral tribunal — Arbitrator ordered payment of adjudicated amounts — Whether court should recognize arbitration award under s 38(1) of Arbitration Act 2005 ('AA') — Whether court had jurisdiction to determine questions referred to court pursuant to s 42(1) of AA — Whether questions were pure legal issues — Whether questions arose from arbitration award — Whether questions substantially affect parties' right in arbitration — Whether arbitration award ought to be set aside — Whether court should order taxation of arbitral costs — Arbitration Act 2005 ss 20, 21(3)(b), 23, 35(1)(a), (3), 37(1)(a)(iv), (v), (b)(ii), (2)(b)(i), (ii), 38(1), 42(1), 44(1)(a)(ii) & (b) — Interpretation Acts 1948 and 1967 s 30(1)(b) & (d) — Rules of Court 2012 O 15 r 16, O 59 r 16(2), (3), (4), (5) & O 59 r 24

Via two letters of award ('the first contract' and 'the second contract'), SQA Builders Sdn Bhd ('SQA') was appointed by Luxor Holdings Sdn Bhd ('LH') and Luxor YRM Sdn Bhd ('LY') as the contractor of certain construction works in a development project ('the project'). The two contracts provided for the application of an agreement known as the PAM Contract 2006 which provided for 'The Conditions of Contract' ('the COC') and there were arbitration agreements in cl 34 of this COC. Disputes arose between the parties in relation to the work done and the non-payment of the work done by LH and LY which eventually led to adjudication proceedings filed by SQA and also arbitration action initiated by LH and LY. The adjudication proceedings which were initiated pursuant to the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') were initially ended in the High Court in favour of SQA whereby the High Court had allowed the enforcement of the adjudication decisions, but the High Court's decision was set aside by the Court of Appeal. In respect of the arbitration, the award ('the award') was as followed: (a) after considering the final account value by the quantity surveyor, SQA's losses due to the extension of time ('the EOT') given by the project architect in relation to the two contracts, previous payments by LH and LY to SQA as well as the payment of the two adjudicated amount pursuant to the adjudication decisions by LH and LY to SQA, the arbitrator determined that

LH shall pay the amount of RM2,122,072.13 to SQA whereas LY shall pay the amount of RM157,646.72 to SQA; and (b) LH and LY shall pay costs to SQA and if the costs could not be agreed by the parties, the costs shall be taxed on a 'party to party' basis. Against this backdrop including the disputes between the parties, the adjudication decisions as well as the arbitration award, the parties proceeded with the filing of four originating summons ie, OS Nos 8, 9, 10, and 14. Via OS No 8, SQA had applied for: (i) an order under s 38(1) of the Arbitration Act 2005 ('the AA') for the court to recognize the arbitration award to be binding and be enforced by entry as a judgment in terms of the award; (ii) a declaration that SQA was entitled to the two adjudicated amounts ie, the sum of RM1,884,254.34 to be paid by LH and the sum of RM474,726.73 to be paid by LY; and (iii) orders that LH and LY shall refund the two adjudicated amount to SQA. OS No 9 was an action filed by LH and LY against SQA to refer ten questions of law (as provided in para 25 of this judgment) to the court pursuant to s 42(1) of the AA but SQA had raised the following preliminary objection ('SQA's PO') against this action: (A) s 42 of the AA had been repealed by the Arbitration (Amendment) (No. 2) Act 2018 ('Act A1569') with effect from 8 May 2018; and (B) considering that OS No 9 was filed after the enforcement of Act A1569, the court had no jurisdiction to hear this action because s 42 of the AA had already been repealed by Act A1569. There was also objection filed by LH and LY ('Objection (encl 20)') against the admissibility of the affidavit affirmed on behalf of SQA which was said to be contrary to the direction given by the deputy registrar that such affidavit ought to be filed and served on 12 October 2021. Further, LH and LY had also filed OS No 10 against SQA to set aside the award under s 37(1)(a)(iv), (v), (b)(ii), (2)(b)(i) and/or (ii) of the AA. Lastly, OS No 14 was filed by SQA against LH and LY for, inter alia, then court's order to tax the arbitration costs.

Held, dismissing SQA's PO with costs to be paid by SQA to LH and LY, dismissing both OS Nos 9 and 10, allowing OS No 8 with the orders as stated in para 71 of the judgment, ordering one set of costs for OS Nos 8, 9 and 10, and deciding OS No 14 in the manner as stated in Part I(8) of the judgment:

(1) The court dismissed objection (encl 20) with no order as to costs for the following reasons: (a) LH and LY had applied to amend OS No 9 which was allowed by the court. The amended OS No 9 was supported by an affidavit affirmed by Mr Yow Thin Wah ('encl 19 (amended OS No 9)'); (b) encl 20 (OS No 9) was filed in reply to encl 19 (amended OS No 9) and if the court upheld Objection (encl 20) and expunged encl 20 (OS No 9) as evidence, there would be an injustice to SQA because the contents of encl 19 (amended OS No 9) would have been deemed to have been accepted by SQA because there was no affidavit from SQA to rebut encl 19 (amended OS No 9); and (c) LH and LY were estopped from raising Objection (encl 20) because they had already replied to encl 20 (OS No 9) by way of an affidavit affirmed by Mr Yow on 4 March 2022.

Consequently, no injustice was occasioned to LH and LY when the court dismissed Objection (encl 20) (see para 16).

(2) The court dismissed SQA's PO for the following reasons, inter alia: (a) that by virtue of ss 23 and 42 of the AA read with s 30(1)(b) and (d) of the Interpretation Acts 1948 and 1967, when SQA received the two notices to arbitrate (26 September 2017), LH and LY already had a vested 'right' and/or 'remedy' under s 42 of the AA to refer questions of law to the High Court which might subsequently arise from the award; (b) if the legislature had intended for the repeal of s 42 of the AA in Act A1569 to apply retrospectively to all arbitrations which had been commenced before 8 May 2018 but the awards had not been delivered on 8 May 2018, the legislature could have easily stated as such in Act A1569 but none was provided; and (c) the wording in s 42(1) of the AA ('Any party may refer to the High Court any question of law arising out of an award') merely concerned when a party may refer to the High Court questions of law which arose out of an award. The words in s 42(1) of the AA could not support a statutory interpretation that Parliament had intended for Act A1569 to apply retrospectively to all arbitral proceedings which had been commenced before 8 May 2018, but the awards had not been delivered on 8 May 2021 (see paras 23–24).

(3) In relation to OS No 9, the court found that question No 10 was a factual issue whereas question Nos 5 and 9 were not pure legal issues, as such, the court had no jurisdiction to decide these questions pursuant to s 42(1) of the AA. Further, question No 1 to question No 4, question No 8, and question No 10 did not arise from the award, as such, the court could not decide these questions under s 42(1) of the AA. Question Nos 1, 2 and 3 which were in relation to the alleged non-compliance with the condition precedent under cl 23 of the COC by SQA to make EOT applications did not affect the rights of LH and LY in the arbitration because based on the evidence, such non-compliance was immaterial to the architect of the project. Question Nos 4 and 5 did not substantially affect the rights of LH and LY in the arbitration because the arbitrator had given cogent reasons in deciding the issues arose regarding SQA's EOT applications in favour of SQA. In respect of question Nos 6 and 7, the court rejected the contention by LH and LY in relation to SQA's non-compliance with the requirement to issue notice to the architect pursuant to cl 24.1 of the COC in claiming the total loss due to the EOTs because notwithstanding cl 24.1 of the COC, cl 34.8(e) of the COC had empowered the arbitrator to decided on SQA's total loss due to the EOTs. Similarly, pursuant to cl 34.8(e) of the COC, the court found that question No 8 did not substantially affect the rights of LH and LY in the arbitration. Based on the above findings, the court dismissed the amended OS No 9 for failure to fulfil the threshold requirements under s 42(1) of the AA. The court

was also of the view that, in reality the amended OS No 9 was an appeal to set aside the award under the guise of an application under s 42 of the AA (see paras 25-35).

(4) With respect to OS No 10, the court was of the view that s 37(1)(a)(iv) and/or (v) of the AA could only be invoked if an arbitral tribunal had decided on an issue or matter which was beyond the terms of submission to the arbitration. So long as an arbitral tribunal had decided on an issue or matter which was within such terms, the arbitral tribunal may give any reason and/or reasoning for the decision as the arbitral tribunal deemed just and appropriate. Further, by reason of s 21(3)(b) of the AA, an arbitrator may draw on his or her 'own knowledge and expertise'. In the present case, considering that the arbitrator had not decided on issue or matter which was beyond the terms of submission to the arbitration, LH and LY could not rely on s 37(1)(a)(iv) and (v) of the AA to support OS No 10. In respect of the contention by LH and LY that the arbitrator had breached the rule of natural justice, the court found that the arbitrator's notes of evidence did not disclose any breach of the first part of s 20 of the AA ie, 'The parties shall be treated with equality' or even the second part of s 20 AA which provided that 'each party shall be given a fair and reasonable opportunity of presenting that party's case'. LH and LY therefore had not succeeded in discharging the legal and evidential burden to prove that the arbitrator had breached the rule of natural justice (see paras 47–48, 52–53 & 59–60).

(5) As for OS No 8, the court had no discretionary power pursuant to s 41 of the Specific Relief Act 1950 and O 15 r 16 of the Rules of Court 2012 ('the ROC') to grant a declaration that SQA was entitled to the two adjudicated amounts because OS No 8 was not a fresh suit instituted by SQA against LH and LY for a court order to enforce the award as provided under s 38(1) of the AA (the second possible order under s 38(1) of the AA). However, in light of the Federal Court decision in the case of *Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd and another appeal* [2020] 1 MLJ 174, the Court of Appeal's decisions in setting aside the adjudication decisions, and the arbitrator's decision that the two adjudicated amounts should have been paid by LH and LY to SQA under the two contracts, it was only just for the court to make the first possible order under s 38(1) of the AA ie, to include the arbitrator's decision in relation to the two adjudicated amounts in the recognition of the award under s 38(1) of the AA because if not, there would be an injustice to SQA considering that SQA had not been paid by LH and LY for the works which formed the subject matter of the arbitrator's decision in relation to the two adjudicated amounts. Further, LH and LY would be unjustly enriched by way of evasion of payment to SQA in relation to such works (see paras 68–71).

(6) In relation to OS No 14, notwithstanding the filing of OS Nos 8, 9 and 10, the arbitrator had the statutory discretion pursuant to s 44(1)(a)(ii) of the AA to tax arbitration costs and the case law doctrine of functus officio could not restrain the exercise of such discretion. However, when the arbitral tribunal had directed a party to pay arbitration costs but had not specified the amount of the costs as in the present case, any party could apply to the High Court pursuant to s 44(1)(b) of the AA for the taxation of the arbitration costs and the court's taxation power under this provision could not be curtailed in any manner by the arbitral tribunal's power to correct an award under s 35(1)(a) and (3) of the AA. Nevertheless, as a general rule, the arbitral tribunal's taxation power should first be exercised. Regarding the basis of taxation, the general rule was that the taxation should be on a standard basis as per O 59 r 16(2), (3) and (5) of the ROC unless there were exceptional circumstances for the court to tax costs on an indemnity basis under O 59 r 16(2) and (4) of the ROC. In the present case, the court was satisfied that the general rule was applicable because there were no such exceptional circumstances proven. The court was of the view that RM500,000 was the reasonable sum for arbitration costs but considering that LH and LY had succeeded at the arbitration regarding two out of five issues submitted to the arbitration, the court exercised its discretion to deduct the sum of RM200,000 from the said reasonable sum, as such, SQA was only entitled to RM300,000 as the costs for arbitration. Further, pursuant to O 59 r 24 of the ROC, the court awarded interest at the rate of 5%pa on the said costs from 6 December 2022 until full payment of the same (see paras 77–78, 80–81, 83, 97, 99 & 103).

[Bahasa Malaysia summary

Melalui dua surat tawaran ('kontrak pertama' dan 'kontrak kedua'), SQA Builders Sdn Bhd ('SQA') telah dilantik oleh Luxor Holdings Sdn Bhd ('LH') dan Luxor YRM Sdn Bhd ('LY') sebagai kontraktor bagi kerja-kerja pembinaan tertentu dalam sebuah projek pembangunan ('projek tersebut'). Kedua-dua kontrak tersebut memperuntukkan pemakaian perjanjian yang dikenali sebagai Kontrak PAM 2006 yang memperuntukkan 'The Conditions of Contract' ('COC') dan terdapat perjanjian timbang tara dalam klausa 34 COC ini. Pertikaian timbul antara pihak-pihak berkaitan dengan kerja yang dilaksanakan oleh SQA dan kegagalan membayar bagi kerja yang dilaksanakan oleh LH dan LY yang akhirnya membawa kepada prosiding adjudikasi yang difailkan oleh SQA dan juga tindakan timbang tara yang dimulakan oleh LH dan LY. Prosiding adjudikasi yang dimulakan menurut Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 (CIPAA) pada awalnya berakhir di Mahkamah Tinggi yang memihak kepada SQA di mana Mahkamah Tinggi telah membenarkan penguatkuasaan keputusan adjudikasi tersebut, tetapi keputusan Mahkamah Tinggi tersebut telah diketepikan oleh Mahkamah Rayuan. Berkenaan dengan tindakan timbang tara tersebut, award ('award')

A yang diberikan adalah seperti berikut: (a) selepas mempertimbangkan nilai akaun akhir oleh juruukur bahan, kerugian SQA akibat lanjutan masa ('EOT') yang diberikan oleh arkitek projek berhubung dengan dua kontrak tersebut, pembayaran terdahulu oleh LH dan LY kepada SQA serta pembayaran oleh LH dan LY kepada SQA bagi dua amaun adjudikasi tersebut menurut B keputusan adjudikasi, penimbang tara memutuskan bahawa LH hendaklah membayar jumlah RM2,122,072.13 kepada SQA manakala LY hendaklah membayar jumlah RM157,646.72 kepada SQA; dan (b) LH dan LY hendaklah membayar kos kepada SQA dan jika kos tersebut tidak dapat dipersetujui oleh pihak-pihak, kos tersebut hendaklah ditetapkan secara 'party C to party'. Dengan latar belakang ini termasuklah pertikaian antara pihak-pihak, keputusan adjudikasi tersebut serta award timbang tara, pihak-pihak meneruskan pemfailan empat saman pemula iaitu, SP Nos 8, 9, 10, dan 14. Melalui SP No 8, SQA telah memohon untuk: (i) perintah di bawah s 38(1) Akta Timbang Tara 2005 ('AT') untuk mahkamah mengiktiraf D award timbang tara sebagai mengikat dan dikuatkuasakan melalui kemasukan sebagai penghakiman berdasarkan terma award tersebut; (ii) pengisytiharan bahawa SQA berhak mendapat dua amaun adjudikasi tersebut iaitu, jumlah RM1,884,254.34 yang perlu dibayar oleh LH dan jumlah RM474,726.73 E yang perlu dibayar oleh LY; dan (iii) memerintahkan bahawa LH dan LY akan memulangkan dua amaun adjudikasi tersebut kepada SQA. SP No 9 ialah tindakan yang difailkan oleh LH dan LY terhadap SQA untuk merujuk sepuluh persoalan undang-undang (seperti yang diperuntukkan dalam perenggan 25 penghakiman ini) kepada mahkamah menurut s 42(1) AT tetapi F SQA telah membangkitkan bantahan awal berikut ('PO SQA') terhadap tindakan ini: (A) s 42 AT telah dimansuhkan oleh Akta Timbang Tara (Pindaan) (No 2) 2018 ('Akta A1569') berkuat kuasa 8 Mei 2018; dan (B) memandangkan SP No 9 telah difailkan selepas penguatkuasaan Akta A1569, mahkamah tidak mempunyai bidang kuasa untuk mendengar G tindakan ini kerana s 42 AT telah pun dimansuhkan oleh Akta A1569. Terdapat juga bantahan yang difailkan oleh LH dan LY ('bantahan (lampiran 20)') terhadap kebolehterimaan afidavit yang disahkan bagi pihak SQA yang dikatakan bertentangan dengan arahan yang diberikan oleh timbalan pendaftar yang mengarahkan afidavit tersebut perlu difailkan dan diserahkan H pada 12 Oktober 2021. Selanjutnya, LH dan LY juga telah memfailkan SP No 10 terhadap SQA untuk mengenepikan award tersebut di bawah s 37(1)(a)(iv), (v), (b)(ii), (2)(b)(i) dan/atau (ii) AT. Akhir sekali, SP No 14 telah difailkan oleh SQA terhadap LH dan LY untuk, antara lain, perintah mahkamah untuk menetapkan kos timbang tara.

I

Diputuskan, menolak PO SQA dengan kos dibayar oleh SQA kepada LH dan LY, menolak SP Nos 9 dan 10, membenarkan SP No 8 dengan perintah-perintah seperti yang ditetapkan dalam perenggan 71 penghakiman ini, memerintahkan satu set kos untuk SP Nos 8, 9 dan 10, dan memutuskan

SP No 14 dengan cara seperti yang ditetapkan dalam Bahagian I(8) penghakiman ini:

(1) Mahkamah menolak bantahan (lampiran 20) tanpa perintah mengenai kos atas sebab-sebab berikut: (a) LH dan LY telah memohon untuk meminda SP No 9 yang dibenarkan oleh mahkamah. SP No 9 yang dipinda telah disokong oleh afidavit yang disahkan oleh Encik Yow Thin Wah ('lampiran 19 (SP No 9 dipinda)'); (b) lampiran 20 (SP No 9) telah difailkan sebagai jawapan kepada lampiran 19 (SP No 9 dipinda) dan jika mahkamah mengekalkan bantahan (lampiran 20) dan mengenepikan lampiran 20 (SP No 9) sebagai keterangan, akan berlaku ketidakadilan kepada SQA kerana kandungan lampiran 19 (SP No 9 dipinda) akan dianggap telah diterima oleh SQA kerana tiada afidavit daripada SQA untuk menyangkal lampiran 19 (SP No 9 dipinda) ini; dan (c) LH dan LY dihalang daripada membangkitkan bantahan (lampiran 20) kerana mereka telah pun menjawab lampiran 20 (SP No 9) melalui afidavit yang disahkan oleh En. Yow pada 4 Mac 2022. Akibatnya, tiada ketidakadilan berlaku ke atas LH dan LY apabila mahkamah menolak bantahan (lampiran 20) (lihat perenggan 16).

(2) Mahkamah menolak PO SQA atas sebab-sebab berikut, antara lain: (a) bahawa menurut ss 23 dan 42 AT dibaca bersama s 30(1)(b) dan (d) Akta Tafsiran 1948 dan 1967, apabila SQA menerima dua notis untuk timbang tara (26 September 2017), LH dan LY sudah mempunyai 'hak' dan/atau 'remedi' di bawah s 42 AT untuk merujuk persoalan undang-undang kepada Mahkamah Tinggi yang mungkin timbul kemudiannya daripada award tersebut; (b) jika badan perundangan berhasrat agar pemansuhan s 42 AT dalam Akta A1569 digunakan secara retrospektif bagi semua tindakan timbang tara yang telah dimulakan sebelum 8 Mei 2018 tetapi award tidak diberikan pada 8 Mei 2018, badan perundangan boleh dengan mudah menyatakan sedemikian dalam Akta A1569 tetapi ianya tidak diperuntukkan; dan (c) perkataan dalam s 42(1) AT ('Mana-mana pihak boleh merujuk kepada Mahkamah Tinggi apa-apa soal undang-undang yang timbul daripada suatu award') hanya berkenaan dengan keadaan apabila sesuatu pihak boleh merujuk persoalan undang-undang yang timbul daripada award tersebut kepada Mahkamah Tinggi. Perkataan dalam s 42(1) AT tidak dapat menyokong tafsiran berkanun bahawa Parlimen telah berhasrat untuk Akta A1569 digunakan secara retrospektif kepada semua prosiding timbang tara yang telah dimulakan sebelum 8 Mei 2018, tetapi awardnya belum diserahkan pada 8 Mei 2021 (lihat perenggan 23–24).

(3) Berhubung dengan SP No 9, mahkamah mendapati soalan No 10 adalah isu fakta manakala soalan Nos 5 dan 9 bukanlah isu undang-undang yang tulen, oleh itu, mahkamah tidak mempunyai bidang kuasa untuk memutuskan soalan-soalan ini menurut s 42(1) AT. Selanjutnya, soalan

No 1 hingga soalan No 4, soalan No 8, dan soalan No 10 tidak timbul daripada award tersebut, oleh itu, mahkamah tidak boleh memutuskan soalan-soalan ini di bawah s 42(1) AT. Soalan Nos 1, 2 dan 3 yang berkaitan dengan dakwaan ketidakpatuhan syarat duluan di bawah klausa 23 COC oleh SQA untuk membuat permohonan EOT tidak menjejaskan hak LH dan LY dalam timbang tara kerana berdasarkan keterangan, ketidakpatuhan tersebut adalah tidak penting kepada arkitek projek tersebut. Soalan Nos 4 dan 5 tidak menjejaskan hak LH dan LY dengan ketara dalam timbang tara tersebut kerana penimbang tara telah memberikan alasan yang kukuh dalam memutuskan isu yang timbul berkaitan permohonan EOT oleh SQA yang memihak kepada SQA. Berkenaan dengan soalan Nos 6 dan 7, mahkamah menolak hujahan oleh LH dan LY berhubung ketidakpatuhan SQA terhadap keperluan untuk mengeluarkan notis kepada arkitek menurut klausa 24.1 COC dalam menuntut jumlah kerugian akibat EOT tersebut kerana walaupun tanpa mengambil kira klausa 24.1 COC, klausa 34.8(e) COC telah memberi kuasa kepada penimbang tara untuk memutuskan jumlah kerugian SQA yang disebabkan oleh EOT tersebut. Begitu juga, menurut klausa 34.8(e) COC, mahkamah mendapati soalan No 8 tidak menjejaskan hak LH dan LY dengan ketara dalam tindakan timbang tara tersebut. Berdasarkan dapatan-dapatan di atas, mahkamah menolak SP No 9 yang dipinda kerana gagal memenuhi keperluan ambang di bawah s 42(1) AT. Mahkamah juga berpandangan bahawa, secara realitinya SP No 9 yang dipinda adalah rayuan untuk mengenepikan award tersebut di bawah samaran permohonan di bawah s 42 AT (lihat perenggan 25-35).

(4) Berkenaan dengan SP No 10, mahkamah berpendapat bahawa s 37(1)(a)(iv) dan/atau (v) AT hanya boleh digunakan jika tribunal timbang tara telah memutuskan sesuatu isu atau perkara yang berada di luar terma penyerahan kepada timbang tara. Selagi mana tribunal timbang tara memutuskan isu atau perkara yang berada dalam terma tersebut, tribunal timbang tara boleh memberikan apa-apa sebab dan/atau alasan bagi keputusan tersebut sebagaimana yang dianggap adil dan sesuai oleh tribunal timbang tara. Selanjutnya, disebabkan oleh s 21(3)(b) AT, penimbang tara boleh menggunakan 'pengetahuan dan kepakarannya sendiri'. Dalam kes ini, memandangkan bahawa penimbang tara tidak memutuskan isu atau perkara yang di luar terma penyerahan kepada timbang tara, LH dan LY tidak boleh bergantung pada s 37(1)(a)(iv) dan (v) AT untuk menyokong SP No 10. Berkenaan dengan pertikaian oleh LH dan LY bahawa penimbang tara telah melanggar peraturan keadilan semulajadi, mahkamah mendapati bahawa nota keterangan penimbang tara tidak mendedahkan apa-apa pelanggaran bahagian pertama s 20 AT iaitu, 'Pihak-pihak hendaklah dilayan sama rata' atau pun bahagian kedua s 20 AT yang memperuntukkan bahawa 'setiap pihak hendaklah diberi peluang yang

adil dan munasabah untuk mengemukakan kes pihak itu'. Oleh itu LH dan LY tidak berjaya melepaskan beban undang-undang dan keterangan untuk membuktikan bahawa penimbang tara telah melanggar peraturan keadilan semula jadi (lihat perenggan 47–48, 52–53 & 59–60).

(5) Bagi SP No 8, mahkamah tidak mempunyai kuasa budi bicara menurut s 41 Akta Relief Spesifik 1950 dan A 15 k 16 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') untuk memberikan pengisytiharan bahawa SQA berhak kepada dua amaun adjudikasi tersebut kerana SP No 8 bukanlah saman baharu yang dimulakan oleh SQA terhadap LH dan LY untuk perintah mahkamah bagi menguatkuasakan award seperti yang diperuntukkan di bawah s 38(1) AT (perintah kedua yang mungkin boleh diberikan di bawah s 38(1) AT). Bagaimanapun, berdasarkan keputusan Mahkamah Persekutuan dalam kes *Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd and another appeal* [2020] 1 MLJ 174, keputusan Mahkamah Rayuan yang mengenepikan keputusan adjudikasi, dan keputusan penimbang tara bahawa kedua-dua amaun adjudikasi tersebut sepatutnya dibayar oleh LH dan LY kepada SQA di bawah kedua-dua kontrak tersebut, adalah adil untuk mahkamah membuat perintah pertama yang mungkin boleh diberikan di bawah s 38(1) AT iaitu, untuk memasukkan keputusan penimbang tara berhubung dengan dua amaun adjudikasi tersebut dalam pengiktirafan award di bawah s 38(1) AT kerana jika tidak, akan berlaku ketidakadilan kepada SQA memandangkan SQA tidak dibayar oleh LH dan LY untuk kerja-kerja yang membentuk perkara subjek dalam keputusan penimbang tara berhubung dengan dua amaun adjudikasi tersebut. Selanjutnya, LH dan LY akan diperkaya secara tidak adil dengan cara mengelak pembayaran kepada SQA berhubung dengan kerja-kerja tersebut (lihat perenggan 68–71).

(6) Berhubung dengan SP No 14, walaupun SP Nos 8, 9 dan 10 sudah difailkan, penimbang tara tetap mempunyai budi bicara berkanun menurut s 44(1)(a)(ii) AT untuk menetapkan kos timbang tara dan doktrin kes undang-undang functus officio tidak boleh menghalang penggunaan budi bicara sedemikian. Walau bagaimanapun, apabila tribunal timbang tara telah mengarahkan satu pihak membayar kos timbang tara tetapi tidak menyatakan jumlah kos seperti yang berlaku dalam kes ini, mana-mana pihak boleh memohon kepada Mahkamah Tinggi menurut s 44(1)(b) AT untuk penetapan kos timbang tara dan kuasa penetapan kos oleh mahkamah di bawah peruntukan ini tidak boleh disekat dalam apa-apa cara oleh kuasa tribunal timbang tara untuk membetulkan award di bawah s 35(1)(a) dan (3) AT. Namun begitu, sebagai peraturan am, kuasa penetapan kos tribunal timbang tara harus dilaksanakan terlebih dahulu. Mengenai asas penetapan, peraturan amnya ialah penetapan hendaklah mengikut asas standard seperti yang ditetapkan di dalam A 59 k 16(2), (3) dan (5) KKM 2012 melainkan

terdapat keadaan luar biasa untuk mahkamah menetapkan kos atas dasar indemniti di bawah A 59 k 16(2) dan (4) KKM 2012. Dalam kes ini, mahkamah berpuas hati bahawa peraturan am tersebut adalah terpakai kerana tiada keadaan luar biasa sedemikian yang dibuktikan. Mahkamah berpendapat bahawa RM500,000 adalah jumlah yang munasabah untuk kos timbang tara tetapi memandangkan LH dan LY telah berjaya dalam timbang tara berkenaan dengan dua daripada lima isu yang dikemukakan kepada timbang tara, mahkamah menggunakan budi bicaranya untuk menolak jumlah RM200,000 daripada jumlah munasabah tersebut, oleh itu, SQA hanya layak menerima RM300,000 sebagai kos timbang tara. Selanjutnya, menurut A 59 k 24 KKM 2012, mahkamah memerintahkan faedah pada kadar 5% setahun ke atas kos tersebut dari 6 Disember 2022 sehingga pembayaran penuh yang sama (lihat perenggan 77–78, 80–81, 83, 97, 99 & 103).]

Cases referred to

AMDAC (M) Sdn Bhd v BYD Auto Industry Co Ltd [2020] 11 MLJ 281; [2020] 6 CLJ 625, HC (refd)

Allard v University of British Columbia 2021 BCSC 60, SC (distd)

Dewani Design Sdn Bhd v Zhongji Construction Sdn Bhd and another case [2022] MLJU 3171; [2023] 2 MLRH 84, HC (refd)

Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1, FC (refd)

Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd and another appeal [2020] 1 MLJ 174; [2020] 1 CLJ 299, FC (folld)

Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor [2019] 2 MLJ 413, FC (refd)

Johawaki Development Sdn Bhd v Majlis Agama Islam Wilayah Persekutuan and another case [2020] MLJU 660, HC (refd)

Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd [2015] 6 MLJ 126; [2015] 1 CLJ 617, CA (refd)

MMC Engineering Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd [2015] 10 MLJ 689, HC (refd)

Mammoth Empire Construction Sdn Bhd v Kenwise Sdn Bhd and another case [2020] MLJU 1473, HC (refd)

Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd [2020] 12 MLJ 198, FC (refd)

Murray & Roberts Australia Pty Ltd v Earth Support Company (Sea) Sdn Bhd [2015] MLJU 2319; [2015] 3 AMR 152, HC (refd)

Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal [2021] 1 MLJ 1, FC (refd)

Pembinaan Limbongan Setia Berhad v Josu Engineering Construction Sdn Bhd [2020] MLJU 192, HC (refd)

Ragawang Corporation Sdn Bhd v One Amerin Residence Sdn Bhd [2020] MLJU 1141; [2020] 7 AMR 365, HC (refd)

Ragawang Corporation Sdn Bhd v One Amerin Residence Sdn Bhd and other

cases [2022] MLJU 2121, HC (refd)
Siemens Industry Software GmbH & Co Kg (Germany) (formerly known as Innotec GmbH) v Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd) (M) & Ors [2020] 3 MLJ 1, FC (refd)
Sundralingam v Ramanathan Chettiar [1967] 2 MLJ 211, FC (refd)
Syahin Hafiy Danial bin Soh Ahmad Luptepi Amin v Mansur bin Yunus & Anor [2021] 8 MLJ 297, HC (refd)
Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd v Sunway City Sdn Bhd [2019] 2 MLJ 495, CA (folld)
Teong Piling Co v Asia Insurance Co Ltd [1994] 1 MLJ 444, HC (distd)
Tokio Marine Insurans (M) Berhad v Hi-Poly Industries Sdn Bhd [2020] MLJU 1446, HC (refd)
Zenbay Sdn Bhd v Yong Choo Kui Shipyard Sdn Bhd [2015] MLJU 907; [2015] 10 CLJ 924, HC (refd)

Legislation referred to

Arbitration Act 2005 ss 2(1), 8, 20, 21, 21(3)(b), 23, 34(4), 35, 35(1)(a), (3), (4), 36, 36(1), (6), 37, 37(1), (1)(a)(iv), (1)(a)(v), (1)(b)(ii), (2)(b)(i), (2)(b)(ii), 38, 38(1), 39, 39(1)(a)(i), (1)(a)(ii), (1)(a)(iii), (1)(a)(iv), (1)(a)(v), (1)(a)(vi), (1)(a)(vii), (1)(b)(i), (1)(b)(ii), 42, 42(1), (1A), (4), (4)(b), (4)(c), (4)(d), 44, 44(1), (1)(a)(ii), (1)(b), (5)
Arbitration Act RSBC 1996 (repealed by Arbitration Act SBC 2020) [CN] s 11
Arbitration Act SBC 2020 [CN]
British Columbia International Commercial Arbitration Center Rules [CN] r 41
Courts of Judicature Act 1964 s 68(1)(c)
Interpretation Acts 1948 and 1967 s 30(1), 30(1)(b), (1)(d)
Rules of Court 2012 O 15 r 16, O 56 rr 1(1), 12(1)(b), 16, 16(1)(a), 16(1)(b), 16(1)(c), 16(1)(e), 16(1)(f), 16(2), 16(3), 16(4), 16(5), O 59 r 17
Rules of the High Court 1980 (repealed by Rules of Court 2012)
Specific Relief Act 1950 s 41

Lim Chee Wee (with Ringo Low Kim Leng, Lam Wai Loon, Serene Hiew Mun Yi and Lim Ren Wei) (Harold & Lam Partnership) for SQA.
R Thayalan a/l Retanavalu (with Abdul Shukor bin Ahmad, Thong Chee Whei and Ee Kim Hau) (KH Ee & Partners) for LH and LYRM.

Wong Kian Kheong J:

A. INTRODUCTION

[1] This judgment concerns the following four originating summonses ('four OS'):

A

(1) in amended OS No BA-24C(Arb)-8–08 of 2021 ('OS No 8'), SQA Builders Sdn Bhd ('SQA') has applied for, among others, the following orders against Luxor Holdings Sdn Bhd ('LH') and Luxor YRM Sdn Bhd ('LY'):

B

(a) an order under s 38(1) of the Arbitration Act 2005 ('the AA') to recognize a final arbitral award dated 30 July 2021 ('award') made by an arbitrator, Dato' Ar Kevin Woo Thin Fook (arbitrator), to be binding and be enforced by entry as a judgment in terms of the award;

C

(b) a declaration that SQA is entitled to the following two amounts which had been adjudicated under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') as follows:

(i) a sum of RM1,884,254.34 ('adjudicated amount (SQA-LH)') which had been adjudicated in an adjudication decision dated 5 September 2017 by Ms Savithiri A/P Ganesan to be paid by LH to SQA ('adjudication decision (SQA-LH)'); and

D

(ii) a sum of RM474,726.73 ('adjudicated amount (SQA-LY)') which had been adjudicated in an adjudication decision dated 25 August 2017 by Encik Md Lotefi bin Abd Latif to be paid by LY to SQA ('adjudication decision (SQA-LY)').

E

This judgment shall refer to the adjudicated amount (SQA-LH) and adjudicated amount (SQA-LY) collectively as the 'two adjudicated amounts';

F

(c) an order that LH shall refund the adjudicated amount (SQA-LH) to SQA; and

(d) an order that LY shall refund the adjudicated amount (SQA-LY) to SQA;

G

(2) OS No BA-24C(Arb)-9–09 of 2021 has been filed by LH and LY against SQA ('OS No 9'). OS No 9 refers ten questions of law ('ten questions (OS No 9)') to this court pursuant to s 42(1) of the AA;

H

(3) LH and LY have also filed OS No BA-24C(Arb)-10–09 of 2021 against SQA to set aside the award under s 37(1)(a)(iv), (v), (b)(ii), (2)(b)(i) and/or (ii) of the AA ('OS No 10'); and

I

(4) OS No BA-24C(Arb)-14–12 of 2021 has been filed by SQA against LH and LY (OS No 14) for, among others, an order to tax the costs ('costs (arbitration)') of the arbitral proceedings (arbitration) pursuant to the award.

B. BACKGROUND

[2] SQA was appointed by way of two contracts ('two contracts') to perform certain construction works ('works') in a project known as 'Building Works for the Proposed Industrial/Office Development on Lot PT9922, Jalan Teknologi, Kota Damansara, PJU 5, Daerah Petaling, Selangor Darul Ehsan' ('project'). The two contracts are as follows:

(1) in a 'letter of award' (LA) dated 27 November 2012, LH appointed SQA to perform the works regarding Lot 1 in the project ('first contract'). The value of the first contract was RM28,781,205.48; and

(2) in LA dated 27 November 2012, LY appointed SQA to perform the works on Lots 2 and 3 in the project for a sum of RM10,718,794.52 ('second contract').

[3] The two contracts provided for the application of the 'Agreement and Conditions of PAM Contract 2006 (Without Quantities)' ('PAM Contract 2006'). The PAM Contract 2006 had provided for 'The Conditions of Contract' ('COC'). There were arbitration agreements in cl 34 COC in the two contracts.

[4] Disputes regarding the two contracts arose between SQA on the one part and LH and LY on the other part ('disputes (two contracts)').

B(1). Adjudication proceedings

[5] SQA commenced the following two adjudication proceedings under the CIPAA ('two adjudication proceedings'):

(1) SQA claimed for payment for works done in the project under the first contract which had not been paid by LH ('first adjudication proceedings'). In the first adjudication proceedings, the adjudication decision (SQA-LH) was made wherein LH was adjudicated to pay the adjudicated amount (SQA-LH) to SQA; and

(2) in the second adjudication proceedings, SQA claimed that LY had not paid for works performed by SQA in the project pursuant to the second contract ('second adjudication proceedings'). The adjudication decision (SQA-LY) was delivered in the second adjudication proceedings, namely, LY was adjudicated to pay the adjudicated amount (SQA-LY) to SQA.

[6] With regard to the adjudication decision (SQA-LH) and adjudication decision (SQA-LY) (collectively referred to in this judgment as the 'two adjudication decisions'):

(1) LH and LY had applied to the High Court to set aside the two adjudication decisions ('two setting aside applications (two adjudication decisions)');

(2) SQA had applied for leave of the High Court to enforce the two adjudication decisions ('two enforcement applications (two adjudication decisions)');

(3) the High Court had decided as follows:

(a) the two setting aside applications (two adjudication decisions) were dismissed; and

(b) the two enforcement applications (two adjudication decisions) were allowed,

('High Court's decisions (two adjudication decisions)').

(4) LH and LY appealed to the Court of Appeal against the High Court's decisions (two adjudication decisions) and these appeals were allowed by the Court of Appeal on 26 March 2021 ('Court of Appeal's decisions (two adjudication decisions)'). By virtue of the Court of Appeal's decisions (two adjudication decisions), the two adjudication decisions and High Court's decisions (two adjudication decisions) were set aside.

B(2). Arbitration

[7] By way of two letters to SQA, each dated 26 September 2017, LH and LY had requested for the disputes (two contracts) to be referred to arbitration ('two notices to arbitrate (26 September 2017)').

[8] In the arbitration:

(1) with regard to the first contract:

(a) LH alleged as follows, among others:

(i) on 7 December 2016, the project's quantity surveyor, Messrs 'Juru Kos' (QS), had issued to SQA an amended 'Statement of Final Account' in respect of the works performed by SQA under the first contract ('QS's SFA (first contract)'). By reason of cl 30.10(b) COC, LH contended that SQA was bound by the contents of QS's SFA (first contract);

(ii) QS's SFA (first contract) stated, among others, that LH only owed a total sum of RM1,041,655.45 to SQA for the works and after deducting the 'Second Moiety' amount (part of the retention fund) of RM719,530.14 (to pay for the rectification of defects in SQA's works) ('second moiety sum (first contract)'), the QS only proposed a sum of RM322,125.31 to be paid by LH to SQA

('alleged sum due to SQA (first contract)'); A

(iii) the project's architect, Messrs Prisma Architect ('architect'), had granted four extensions of time ('EOT') for SQA to complete the works ('four EOTs (first contract)'). According to LH, the four EOTs (first contract) were invalid and there was therefore delay in the works by SQA ('alleged SQA's delay (first contract)'); B

(iv) as a result of the alleged SQA's delay (first contract), LH claimed liquidated damages (LD) from SQA in a sum of RM3,980,000 ('LD (first contract)') (based on the rate of RM10,000 per day of delay as provided in cl 8(c) in the LA for the first contract); C

(v) the works performed by SQA were defective ('alleged defective works (first contract)'). Consequently, LH had to incur an amount of RM608,698 ('rectification cost (first contract)') to remedy the alleged defective works (first contract); and D

(vi) taking into account the alleged sum due to SQA (first contract), LD (first contract) and rectification cost (first contract), SQA owed a sum of RM1,105,133.54 to LH under the first contract ('LH's claim (first contract)'). E

(b) SQA resisted LH's claim (first contract) and counterclaimed from LH as follows, among others ('SQA's counterclaim (first contract)'):

(1) a total sum of RM3,161,439.15 had been certified by the architect to have been performed by SQA ('certified sum (first contract)'); F

(2) SQA had performed additional works at the request of LH ('variation works (first contract)');

(3) as the 'Defect Liability Period' had expired on 1 August 2016, SQA was entitled to a return of the second moiety sum (first contract) from LH; G

(4) the architect should have granted EOT to SQA up to the date of the issuance of the 'Certificate of Practical Completion' on 2 February 2015 ('CPC (first contract)'). Hence, SQA was entitled to claim for 'Loss and Expense' from LH ('SQA's loss due to EOT (first contract)'). SQA had provided two bases for the computation of SQA's loss due to EOT (first contract); and H

(5) SQA was entitled to be paid the adjudicated amount (SQA-LH) by LH. I

(2) in respect of the second contract:

(a) LY had claimed as follows from SQA, among others ('LY's claim (second contract)'):

A (i) SQA was bound by the contents of QS's amended SFA issued on 7 December 2016 in respect of the works performed by SQA under the second contract ('QS's SFA (second contract)');

(ii) on 20 September 2017, the architect had issued a 'Final Certificate' B to SQA ('architect's FC (second contract)') which stated that LY only owed a sum of RM314,700.69 to SQA and this sum included the second moiety amount of RM162,624.50 ('second moiety sum (second contract)'). According to LY, the architect's FC (second contract) was final and conclusive;

C (iii) SQA had already claimed from LY for the second moiety sum (second contract) in the second adjudication proceedings and the adjudicated amount (SQA-LY) included the second moiety sum (second contract);

D (iv) SQA was given two EOTs for works regarding Lot 2 ('two EOTs (Lot 2)'). LY disputed the validity of two EOTs (Lot 2). Accordingly, LY averred that SQA had delayed in the completion of the works for Lot 2 ('alleged SQA's delay (Lot 2)'). For the alleged SQA's delay (Lot 2), LY claimed LD from SQA amounting to E RM833,450 (based on the rate of RM3,950 per day of delay as provided in cl 8(c) in the LA for the second contract) ('LD (Lot 2)');

(v) the architect had given two EOTs for works regarding Lot 3 ('two EOTs (Lot 3)'). Despite the two EOTs (Lot 3), there was a delay by F SQA in the completion of the works for Lot 3 ('alleged SQA's delay (Lot 3)');

(vi) LY did not accept the two EOTs (Lot 3) and claimed LD from SQA in a sum of RM683,400 Lot (based on the rate of RM2,550 per day of delay in accordance with cl 9(c)(ii) in the LA (second contract) G ('LD (Lot 3)'); and

(vii) taking into account the architect's FC (second contract), LD (Lot 2), LD (Lot 3) and LY's payment of the adjudicated amount (SQA-LY) (which included the second moiety sum (second H contract)'), SQA owed a sum of RM1,519,235.55 to LH under the second contract.

(b) LY's claim (second contract) was denied by SQA. Additionally, SQA counterclaimed from LY as follows, among others ('SQA's counterclaim (second contract)'):

I (i) the architect should have granted EOT for SQA regarding the works in Lot 3;

(ii) additional works had been done by SQA ('variation works (second contract)'); and

(iii) SQA had suffered loss due to EOTs granted by the architect as well as loss due to EOTs which should have been granted by the architect ('SQA's loss due to EOT (second contract)'). SQA had provided two bases for the computation of SQA's loss due to EOT (second contract).

[9] The following five issues had been presented by LH, LY and SQA to the arbitrator ('five issues (arbitration)') (para 62 award):

(1) whether QS's SFA (first contract) and QS's SFA (second contract) were deemed final and conclusive ('first issue (arbitration)');

(2) whether SQA was entitled to claim for variation works (first contract) and variation works (second contract) ('second issue (arbitration)');

(3) whether SQA had caused the delays in the performance of the works for which LH and LY were entitled to impose LD totalling RM5,496,850 from the expiry of the original completion dates of Lots 1, 2 and 3 (collectively referred to in this judgment as the 'three lots') until the dates of issuance of CPC for the three lots ('third issue (arbitration)');

(4) With regard to the third issue (arbitration), whether SQA was entitled to an extension of time beyond EOTs granted by the architect up to the date of issue of the 'Certificate of Completion and Compliance' (CCC) ('related question to third issue (arbitration)');

(5) whether SQA was entitled to claim for SQA's loss due to EOT (first contract) and SQA's loss due to EOT ('(second contract) (fourth issue (arbitration)'); and

(6) whether SQA had failed to rectify defects in the works for which:

(a) LH and LY could withhold the second moiety sum for the two contracts; and

(b) rectification costs should be assessed in the arbitration,

('fifth issue (arbitration)').

[10] The arbitrator had answered the five issues (arbitration) as follows:

(1) with regard to the first issue (arbitration):

(a) the arbitrator decided that the QS's valuations of the variation works (first contract) and variation works (second contract) (collectively referred to in this judgment as 'QS's valuations (variation works)') in QS's SFA (first contract) and QS's SFA (second contract) respectively were final and conclusive — paras 78 and 79 award; and

(b) except for the QS's valuations (variation works), according to the arbitrator, the other contents of QS's SFA (first Contract) and QS's SFA (second contract) could not be final and conclusive — paras 63–77 and 89–99 award.

(2) in paras 100–119 award, the arbitrator had held that SQA was not entitled to claim for variation works (first contract) and variation works (second contract). Hence, the second issue (arbitration) was resolved in favour of LH and LY;

(3) in respect of the third issue (arbitration):

(a) regarding the causes of delay in the works, the arbitrator preferred the opinion of SQA's expert witness, Mr Chung Sheaun Seen (Mr Chung), to the view of the expert witness of LH and LY, Mr John Wong Weng Long (Mr Wong): paras 132–159 award;

(b) in paras 160–163 and 216 award, the arbitrator determined that all EOTs granted by the architect pursuant to the two contracts were valid; and

(c) the arbitrator rejected the claim for LD by LH and LY — para 164 award.

(4) regarding the related question to third issue (arbitration):

(a) in paras 165–207 and 232 award, for Lot 1, the arbitrator decided that SQA was entitled to a further extension of 143 days (beyond EOTs granted by the architect) up to 2 February 2015 (date of CCC); and

(b) with regard to Lot 3, the arbitrator had determined that SQA was entitled to a further extension of 210 days (beyond EOTs granted by the architect) up to 25 June 2015 (date of CCC) — paras 208 to 232 award.

(5) in paras 233–251 award, the arbitrator had resolved the fourth Issue (arbitration) in SQA's favour, namely, SQA was entitled to claim a total sum of RM762,893.28 from LH and LY for SQA's loss due to EOT (first contract) and SQA's loss due to EOT (second contract) (collectively referred to in this judgment as 'SQA's total loss due to EOTs'); and

(6) with regard to the fifth issue (arbitration):

(a) the arbitrator had determined that:

(i) there were defects regarding '*Rooftop Ponding*' for Lot 1 ('defects (rooftop ponding)') and SQA was liable for rectification cost of the defects (rooftop ponding) in a sum of RM215,564 ('rectification cost (rooftop ponding)') — paras 252–307 and 326–329 award; and

(ii) there were no defects regarding the 'Basement Scupper Drains' —

paras 308–324 and 326 award; and

(b) subject to the deduction for rectification cost (rooftop ponding), SQA was entitled to the second moiety sum for the two contracts — para 328 award.

[11] In summary, the award was as follows, among others:

(1) for the first contract, after taking into account the 'Final Account Value' by the QS, SQA's loss due to EOT (first contract), LH's previous payments to SQA, LH's payment of the adjudicated amount (SQA-LH) to SQA and rectification cost (rooftop ponding), the arbitrator decided that LH shall pay a sum of RM2,122,072.13 to SQA: paras 329–330 and 332 award;

(2) with regard to the second contract, after considering the 'Final Account Value' by the QS, SQA's loss due to EOT (second contract), LY's previous payments to SQA and LY's payment of the adjudicated amount (SQA-LY) to SQA, the arbitrator determined that LY shall pay an amount of RM157,646.72 to SQA — paras 331–332 award; and

(3) LH and LY shall pay costs (arbitration) to SQA and if the costs (arbitration) could not be agreed by the parties, the costs (arbitration) shall be taxed on a 'party to party' basis — paras 334–337 and para 3 of Part N award ('sub-para N(3) award').

C. FOUR OS

[12] SQA's learned lead counsel had raised the following preliminary objection to OS No 9 ('SQA's PO (OS No 9)'):

(1) s 42 of the AA had been repealed by arbitration (Amendment) (No 2) Act 2018 (Act A1569) with effect from 8 May 2018; and

(2) OS No 9 was filed on 6 September 2021 (after the enforcement of Act A1569). Accordingly, the court has no jurisdiction to hear OS No 9 because s 42 of the AA has already been repealed by Act A1569 when OS No 9 was filed.

[13] In OS No 9, learned lead counsel for LH and LY had objected to the admissibility of an affidavit affirmed on SQA's behalf by Mr Justin Hiep Dinh Vu on 18 November 2021 ('encl 20 (OS No 9)'). LH and LY objected to encl 20 (OS No 9) ('objection (encl 20)') on the ground that the learned Deputy Registrar of the High Court had given directions for the filing and service of all affidavits for OS No 9 on 12 October 2021 ('DR's Directions (OS No 9)') and encl 20 (OS No 9) had been filed and served contrary to DR's Directions (OS No 9). Furthermore, according to learned lead counsel for LH and LY, SQA

had not obtained leave of court to file and serve encl 20 (OS No 9).

[14] I had proposed the following approach in the disposal of these four OS and all the parties had agreed to this approach:

(1) the court will first decide objection (encl 20);

(2) SQA's PO (OS No 9) will then be determined;

(3) if SQA's PO (OS No 9) is accepted, OS No 9 shall be consequently dismissed. If the court however dismisses SQA's PO (OS No 9), the court will then decide the merits of OS No 9;

(4) irrespective of the outcome of OS No 9, OS No 10 will be determined on its merits. The resolution of OS No 10 will affect the outcome of OS No 8; and

(5) lastly, the court will tax the costs (arbitration) in OS No 14.

D. ISSUES

[15] The following questions arise in these four OS:

(1) regarding SQA's PO (OS No 9):

(a) whether Act A1569 applies to this arbitration which commenced when SQA received the two notices to arbitrate (26 September 2017) as understood in s 23 of the AA;

(b) did LH and LY have a 'right' and/or 'remedy' within the meaning of s 30(1)(b) and (d) of the Interpretation Acts 1948 and 1967 ('the IA') on the date of commencement of the arbitration (date of SQA's receipt of the two notices to arbitrate (26 September 2017))? and

(c) as a matter of stare decisis, whether the High Court is bound by a previous High Court's judgment which has been affirmed by the Court of Appeal and Federal Court but there is no written judgment by the Court of Appeal and Federal Court in the earlier case.

(2) if the court dismisses SQA's PO (OS No 9):

(a) whether question No 5 (OS No 9), question No 9 (OS No 9) and question No 10 (OS No 9) were:

(i) factual issues; or

(ii) questions of mixed law and fact,

— to which s 42 of the AA had no application;

(b) did question No 1 (OS No 9) to question No 4 (OS No 9), question No 8 (OS No 9) and question No 10 (OS No 9) arise out of the award as required by s 42(1) of the AA?

(c) do the ten questions (OS No 9) substantially affect the rights of LH and/or LY within the meaning of s 42(1A) of the AA?

(d) is OS No 9 in reality an appeal to the High Court to set aside the award under the guise of an application under s 42 of the AA1 (to refer to the High Court questions of law arising out of the award)? and

(e) even if it is assumed that the ten questions (OS No 9) are pure issues of law which arise out of the award and which substantially affect the rights of LH and/or LY, whether the court should exercise its discretion to grant any remedy to LH and/or LY under s 42(4)(b) to (d) of the AA.

(3) in respect of OS No 10:

(a) whether the arbitrator had decided on any issue which had not been contemplated by or had not fallen within the terms of submission to the arbitration ('terms (submission to arbitration)') as understood in s 37(1)(a)(iv) of the AA;

(b) did the award contain any decision on a matter which was beyond the scope of the terms (submission to arbitration) (within the meaning of s 37(1)(a)(v) of the AA)?

(c) the two questions in the above sub-paras (a) and (b) entail a discussion regarding the distinction between an arbitral tribunal's decision on an issue and the arbitral tribunal's reasons and/or reasoning for that decision;

(d) had the arbitrator breached the second rule of natural justice ('second rule') as provided in s 37(1)(b)(ii), (2)(b)(i) and (ii) of the AA?

(e) whether the arbitrator had breached the first rule of natural justice ('first rule') under s 37(1)(b)(ii), (2)(b)(i) and (ii) of the AA; and

(f) if there is a breach of the first and/or second rule by the arbitrator, should the court exercise its discretion under s 37(1) of the AA to set aside the award?

(4) with regard to OS No 8:

(a) whether the court can exercise its discretion under s 41 of the Specific Relief Act 1950 ('the SRA') and O 15 r 16 of the Rules of Court 2012 ('the RC') to grant a declaration that SQA was entitled to the two adjudicated amounts, especially when:

(i) the CIPAA has no retrospective effect and cannot apply to the two

A contracts as decided by Idrus Harun FCJ in the Federal Court case of *Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd and another appeal* [2020] 1 MLJ 174; [2020] 1 CLJ 299, at [4], [25], [45], [54]–[55], [59]–[62] and [70]–[72]; and

B (ii) the Court of Appeal's decisions (two adjudication decisions) have set aside the High Court's decisions (two adjudication decisions) and two adjudication decisions.

(b) can the court order LH and LR to pay the two adjudicated amounts to SQA under s 38(1) of the AA? and

C (c) in view of:

(i) *Jack-In Pile*;

(ii) the Court of Appeal's decisions (two adjudication decisions); and

D (iii) the arbitrator's decision that the two adjudicated amounts should have been paid by LH and LY to SQA under the two contracts ('arbitrator's decision (two adjudicated amounts)'),

whether the court can recognize the award pursuant to s 38(1) of the AA as binding and enforceable by entry as a judgment in terms of the award to include the arbitrator's decision (two adjudicated amounts); and

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(5) in respect of OS No 14:

F (a) whether the arbitrator could tax the costs (arbitration) after the filing of OS No 8, OS No 9 and OS No 10;

(b) was the arbitrator functus officio after the delivery of the award and could not thereafter tax the costs (arbitration)?

G (c) in the interest of final resolution of disputes between parties, to save judicial time as well as the time, effort and costs of parties, should the arbitrator have exercised his discretion to tax the costs (arbitration) pursuant to s 44(1)(a)(ii) of the AA?

H (d) whether SQA could file OS No 14 after the filing of OS No 8, OS No 9 and OS No 10;

(e) could the arbitrator 'delegate' his discretionary power to tax costs (arbitration) to the High Court?

I (f) whether part of the award regarding taxation of costs (arbitration) was ambiguous and consequently, the High Court could not the tax the costs (arbitration);

(g) whether SQA should have applied to the arbitrator to tax the costs (arbitration) under s 35(1)(a) and (3) of the AA;

(h) can the High Court's Registrar (Registrar) tax the costs (arbitration) under O 59 r 12(1)(b) of the RC? and

(i) whether the High Court should tax the costs (arbitration) on:

(i) a 'standard' basis pursuant to O 59 r 16(2) and (3) of the RC;

(ii) an 'indemnity' basis under O 59 r 16(2) and (4) of the RC; or

(iii) a 'solicitor-client' basis according to O 59 r 17 of the RC.

The issues stated in the above sub-paras (4) and (5) are novel.

E. OBJECTION (ENCL 20)

[16] I have no hesitation to dismiss objection (encl 20) (without any order of costs) due to the following reasons:

(1) LH and LY had applied in court enclosure No 15 to amend OS No 9. The court had allowed this application. Hence, on 27 January 2022 an amended OS No 9 in court encl No 18 ('amended OS No 9') had been filed and served by LH and LY on SQA. Amended OS No 9 was supported by an affidavit affirmed by Mr Yow Thin Wah ('Mr Yow') on 27 January 2022 in court enclosure No 19 ('encl 19 (amended OS No 9)').

(2) encl 20 (OS No 9) was filed in reply to encl 19 (amended OS No 9). If I have upheld objection (encl 20) and expunged encl 20 (OS No 9) as evidence, there would be an injustice to SQA because the contents of encl 19 (amended OS No 9) would have been deemed to have been accepted by SQA because there was no affidavit from SQA to rebut encl 19 (amended OS No 9); and

(3) LH and LY are estopped from raising objection (encl 20) because LH and LY had already replied to encl 20 (OS No 9) by way of an affidavit affirmed by Mr Yow on 4 March 2022. Consequently, no injustice was occasioned to LH and LY when the court dismissed objection (encl 20).

F. AMENDED OS NO 9

F(1). SQA's PO (OS No 9)

[17] I reproduce below ss 23, 42(1), (1A), (4) of the AA and s 30(1) of the IA:

s 23 AA *Commencement of arbitral proceedings*

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request in writing for that dispute to be referred to arbitration is received by the respondent.

s 42 AA *Reference on questions of law*

(1) *Any party may refer to the High Court any question of law arising out of an award.*

(1A) *The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.*

...

(4) *The High Court may, on the determination of a reference —*

(a) *confirm the award*;

(b) *vary the award*;

(c) *remit the award in whole or in part, together with the High Court's determination on the question of law to the arbitral tribunal for reconsideration*; *or*

(d) set aside the award, in whole or in part.

...

s 30 IA *Matters not affected by repeal.*

(1) *The repeal of a written law* in whole or *in part shall not —*

(a) affect the previous operation of the repealed law or anything duly done or suffered thereunder; or

(b) *affect any right*, privilege, obligation or liability *acquired, accrued* or incurred *under the repealed law*; *or*

(c) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the repealed law; or

(d) *affect any* investigation, legal proceeding or *remedy in respect of any such right*, privilege, obligation, liability, penalty, forfeiture or punishment,

and any such investigation, *legal proceeding or remedy may be instituted*, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, *as if the repealing law had not been made*. (Emphasis added.)

[18] SQA's learned counsel has invited the court to accept SQA's PO on the following grounds:

(1) the words 'Any party may refer to the High Court any question of law arising out of an award' in s 42(1) of the AA pre-supposed that the right to refer questions of law to the High Court under s 42(1) of the AA only accrues upon the delivery of the award by the arbitrator. As the award was delivered on 30 July 2021 (after the repeal of s 42 of the AA by Act A1569 on 8 May 2018), the court has no jurisdiction to decide amended OS No 9;

(2) reliance has been placed by SQA on the following four High Court judgments:

(a) the decision of Nantha Balan J (as he then was) in *AMDAC (M) Sdn Bhd v BYD Auto Industry Co Ltd* [2020] 11 MLJ 281; [2020] 6 CLJ 625, at [107], [126], [139]–[149] and [153], as follows:

> [107] *The plain issue here is whether the repeal of s 42 [AA] is to apply prospectively or retrospectively …*
>
> …
>
> [126] *Thus, the key question of law of fundamental importance here is — did Parliament repeal s 42 [AA] with the intention that it should only apply prospectively in respect of arbitrations which commenced after 8 May 2018 or was the repeal intended to apply 'retrospectively' to all arbitrations which were still pending as at 8 May 2018?*
>
> …
>
> [139] *The first question is whether AMDAC only had an 'abstract' right (per Hamilton 's case) or did they have an 'accrued' right.*
>
> [140] *Based on the principles that may be culled from the case of Lim Phin Khian (per Gopal Sri Ram JCA) the right which AMDAC had vis a vis s 42 [AA] was a right which was vested in them at the time of institution of the original arbitration proceedings and not merely as a consequence of an adverse decision ie, the award.*
>
> [141] *Thus, I hold that contrary to the position that was articulated on behalf of BYD, AMDAC did not just have an 'abstract' right. On the contrary, they had the right to challenge any award that was to be given by the arbitrator (albeit that it was inchoate and had yet to be formulated and published) and such a right existed from the commencement of the arbitration proceedings and not upon publication of the award.*
>
> [142] *The next point of importance is that based on the case of Colonial Sugar (per Lord Macnaghten) any legislation which causes the demise of a right of appeal is one which interferes with a substantive right. And based on the cases of Dixie and Lee Chow Meng, clear statutory words are necessary if such substantive rights are to be repealed retrospectively.*
>
> [143] *Here, there are no words whatsoever in [Act A1569] to signify one way or the other whether the repeal is prospective or retrospective. Based on first principles, the rule is that since the amending legislation is silent, the demise of a substantive right is to be construed as taking effect prospectively and not retrospectively.*
>
> [144] *However, the enquiry does not end there, because having regard to the obvious consequence of construing the repeal of s 42 [AA] as having prospective effect, the court is enjoined to examine the legislative history, the explanatory statement to the 2018 Bill and (per Farlim) the content of the Parliamentary speech, if any which may shed light on the intention of Parliament. It is important to emphasise the principle that Parliament does not legislate in vain, and is deemed to be aware of the Macnaghten test.*

A

[145] *Thus, it is imperative to take into consideration the explanatory statement which states that the amendment was to 'promote arbitration as an alternative form of dispute resolution' and (per the Hansard dated 3 April 2018) that the legislative intent behind the amendment is to promote Malaysia's profile on the international and regional arena as a safe-seat and*

B *arbitration-friendly jurisdiction.*

[146] *At the same time, it would be naive and artificial to ignore the reality that Federal Court's decision in Far East Holdings was the immediate catalyst for the repeal. Thus, it is quite clear that the legislative intention was to do away with challenges to arbitral awards under s 42 [AA] and it*

C *would be horrendous to think that the amendment was done whilst allowing awards that are made under pending arbitrations (which commenced prior to 8 May 2018) to take the s 42 route. Such an eventuality would defeat the very purpose for which the repeal was undertaken, which is to insulate arbitral awards from wide ranging*

D *challenges (per Far East Holdings) pursuant to s 42 [AA].*

[147] *As such, the view that I take is that although [Act A15669] does not state anything about the repeal having retrospective effect, looking at all the circumstances, there is room for implying (out of necessity per Lim Phin Khian's case) an intention on the part of Parliament that the repeal of s 42*

E *[AA] was indeed to have retrospective effect.*

[148] *As stated earlier, the Macnaghten test may in certain circumstances be displaced by necessary implication as it was the intention of Parliament that awards are to be final ('muktamad') and are not to be re-opened via the 'widened' judicial door of error of law.*

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[149] *Were it otherwise, then there will be a multitude of awards in pending arbitrations which will keep coming to the High Court through the s 42 route and this process will go on for several years (probably decades) until all the pre-8 May 2018 arbitrations have run their course and it will be several years later before the proverbial 's 42 door' is 'shut'. That would*

G *lead to a rather invidious and uncertain situation which is not what was intended by Parliament.*

...

[153] *In my view, upon examining all the circumstances holistically, the true (and only possible) intention of Parliament by repealing s 42 was for*

H *the repeal to apply retrospectively and to close the door to a s 42 challenge with effect from 8 May 2018 in respect of any award that is published on or after 8 May 2018. The award here falls in that category. In the result, AMDAC's complaints pursuant to s 42 [AA] are accordingly dismissed in limine ...* (Emphasis added.)

I

(b) Darryl Goon Siew Chye J (as he then was) has decided as follows in *Tokio Marine Insurans (M) Berhad v Hi-Poly Industries Sdn Bhd* [2020] MLJU 1446, at [51], [53]–[54] and [62]–[71]:

[51] *Section 42 was concerned with references to the High Court of*

questions of law arising out of awards. It did not deal with arbitration agreements themselves or arbitration proceedings from which an award may give rise to questions of law to be referred. Therefore, the question whether an arbitration that was commenced prior to the repeal of s 42 would be affected by its repeal does not arise.

...

[53] *In light of the foregoing, I respectfully agree with the submissions made on behalf of the Plaintiff that the repeal of s 42 [AA] was not retrospective or intended to be ...*

[54] *As the repeal was not retrospective, s 30(1)(b) [IA] would apply and the issue is whether the right to invoke s 42 was acquired by the plaintiff, or accrued to its benefit, at the commencement of the arbitration, before the repeal of s 42 was brought into force.*

...

[62] *Unlike s 42, the right of appeal in an action in a court of law is not limited to only questions of law and is much wider.*

[63] *Section 42 was a right created by statute. A reference under s 42 was, jurisprudentially, a reference and not to be conflated and treated as synonymous with an appeal in court proceedings.*

[64] *As a right created by statute, s 42 should primarily be considered and construed within the ambit of the statute within which it is provided and not to be taken out of its context and, merely by analogy, equated with a right of appeal, in a different context and in a different legislation.*

[65] *There are numerous legislation with provisions that confer rights in various forms. However, it would obviously be untenable to contend that these rights vest regardless of whether the terms in which they are conferred have been met.*

[66] *Similarly, it would be untenable to suggest that the right to refer to the High Court any question of law arising out of an award, vests even before any award has come into existence; a rationale articulated by Edgar Joseph JR FCJ in Lim Phin Khian.*

[67] *While s 42 may have been available at the commencement of an arbitration yet, it can only be invoked, and thus the right to invoke it, can only vests when an award is made and not before.*

[68] *It was only after the repeal of s 42 had come into force that the Ruling by the learned arbitrator was made but, by then, the right to refer any question of law thereunder no longer existed.*

[69] *Effective prospectively, the repeal of s 42 meant that it could no longer be invoked in respect of awards made after the repeal had come into force.*

[70] *Accordingly, the plaintiff was not entitled to invoke the repealed section 42 [AA] in respect of the Ruling.*

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[71] In *AMDAC (M) Sdn Bhd v BYD Auto Industry Co Ltd* [2020] 11 MLJ 281; [2020] 6 CLJ 625, *S Nantha Balan J (as His Lordship then was) came to the conclusion, after examining the circumstances of the repeal of s 42 holistically, that the intention of Parliament was to close the door to s 42 after 8th May 2018. Thus, s 42 was not be available to all arbitration awards made after that date. Although perhaps by a different route, the same conclusion was arrived at*. (Emphasis added.)

B

(c) the following judgment of Aliza Sulaiman J in *Pembinaan Limbongan Setia Berhad v Josu Engineering Construction Sdn Bhd* [2020] MLJU 192, at [42](b)(iv) :

C

[42] *Having carefully considered the averments in the related Affidavits and the written submissions filed as well as the oral submissions by learned counsels representing the parties, my findings are as follows*:

...

D

(b)(iv) Applicability of s 42 [AA]

...

Applying the above mentioned legal principles as established by high authority, I have no difficulty at all in arriving at the same conclusion as propounded by the plaintiff that s 42 [AA] would affect substantive rights if applied retrospectively. The provision clearly involves the reference to the High Court of any question of law arising out of any award and surely, if the court is minded to answer the question(s) referred to it, the court would inevitably make a determination on serious and important issues or matters which would have a bearing on the substantive rights of the parties in the arbitration. This is borne out by sub-s 42(4) [AA] where the court is given powers to either confirm, vary, remit or set aside the award. Further, where the award is varied by the court, the variation shall have effect as part of the arbitral tribunal's award [sub-s 42(5)] and where it is remitted in whole or in part to the arbitral tribunal for reconsideration, the arbitral tribunal shall make a fresh award [sub-s 42(6)]. To advocate that s 42 [AA] concerns merely procedural matters or does not affect substantive rights if applied retrospectively, is with due respect, quite preposterous.

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In the premises, I conclude that the repeal of s 42 [AA] has prospective, rather than a retrospective, effect. Moreover, pursuant to PU (B) 265/2018 dated 5 May 2018, Act A1569 came into operation on 8 May 2018 ie after the filing of the Plaintiff's OS on 22 December 2017, which is well within the time frame of 42 days of the publication and receipt of the said award as provided in sub-s 42(2) [AA]. (Emphasis added.)

H

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(d) in *Johawaki Development Sdn Bhd v Majlis Agama Islam Wilayah Persekutuan and another case* [2020] MLJU 660 at [166], Aliza Sulaiman J has decided as follows:

[166] *It is an uncontroverted fact that the award was finally published on 14 December 2018. As submitted by Johawaki, when s 42 AA 2005 was*

repealed, there was no award upon which s 42 could apply. Therefore, I am inclined to agree with Johawaki's contention that MAIWP's reliance on s 42 AA 2005 is misconceived. (Emphasis added.)

(e) the High Court's decision in *AMDAC* has been affirmed on appeal to the Court of Appeal. Hence, according to SQA's learned counsel, this court is bound by the Court of Appeal's decision in *AMDAC*.

[19] In *Mammoth Empire Construction Sdn Bhd v Kenwise Sdn Bhd and another case* [2020] MLJU 1473, at [15], I have the misfortune to depart from *AMDAC* as follows:

[15] *With respect, I am unable to follow AMDAC. Diffidently, I am of the view that Act A1569 cannot apply to this arbitration and Mammoth's Reference OS. My reasons are as follows*:

(1) *Part 1 IA applies to AA by reason of s 2(1)(a) IA. Section 30(1) IA provides as follows —*

...

In accordance with s 23 AA, the Arbitral Proceedings in this case commenced on 4.10.2017 when Mammoth received Kenwise's written request to refer their dispute to arbitration. Section 23 AA states as follows —

...

On 4 October 2017 (before the enforcement of Act A1569), Mammoth had a vested 'right' and/or 'remedy' within the meaning of s 30(1)(b) and (d) IA respectively to apply to court under s 42 AA (Vested Right/Remedy);

(2) *Parliament has the prerogative to override Mammoth's Vested Right/Remedy by way of Act A1569 but Parliament has not done so. This is because Parliament has not provided in Act A1569, either expressly or by necessary implication, that Act A1569 shall repeal Mammoth's Vested Right/Remedy. In fact, there is no saving or transitional provision in Act A1569. I rely on the Federal Court's judgment delivered by Jeffrey Tan FCJ in Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749*, at [5] to [7], as follows —*

[5] ... Still, we could take this opportunity to uphold that *it is indeed a rule of construction that a statute should not be interpreted retrospectively to impair an existing right or obligation, unless such a result is unavoidable by reason of the language used in the statute (Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1 *per Lord Brightman, delivering the advice of the Board*).

[6] In *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99, Gunn Chit Tuan CJ (Malaya) said:

On the retrospective operation of Acts, the presumption is that an enactment is not intended to have a retrospective operation unless a contrary intention appears. In this case, that presumption has been rebutted because s 1(5) of the Amendment Act states in clear terms that the amendment was intended to be retrospective. But a retrospective operation should not be given to a statute to impair an existing right and it has been stated by the UK Court of Appeal in

EWP Ltd v Moore [1992] 1 All ER 880 at p 891:

...

Moreover, one should avoid a construction that inflicts a detriment and as Lord Brightman has said in Yew Bon Tew v Kenderaan Bas Mara [1983] 1 MLJ 1 at p 2:

A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past.

[7] *If it takes away a substantive right, the amendment will not have retrospective effect, save by clear and express words. If it is procedural, retrospectivity applies unless otherwise stated in the statute concerned* (*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673 *per Steve Shim CJ (Sabah & Sarawak). If the legislature intends an amendment to have retrospective application, it must expressly and clearly say so (see Puncakdana Sdn Bhd v Tribunal for Housebuyers Claims and another application* [2003] 4 MLJ 9 *per Md Raus J, as he then was). But retrospective effect was not manifested in the language of the amendment. Hence, the amendment to reg 11(2) must be constructed as a prospective provision without any retrospective application*. (Emphasis added.)

(3) *the following two High Court cases had relied on s 30(1) IA so as to apply the previous arbitration Act 1952 [AA (1952)] to arbitral proceedings which were commenced before the enforcement of AA —*

(a) *in Putrajaya Holdings Sdn Bhd v Digital Green Sdn Bhd* [2008] 7 MLJ 757*, at [32], [37] and [40], Ramly Ali J (as he then was) has decided as follows —*

[32] *The repeal of [AA (1952)] in whole shall not affect any right or privilege acquired or accrued under [AA (1952)] or affect any legal proceedings in respect of any such right or privilege and any such legal proceedings may be instituted or continued as if [AA] had not been made.*

...

[37] *In Keith Sellar v Lee Kwang* [1980] 2 MLJ 191 *(FC) at p 193, Hashim Yeop A Sani J (sitting in the Federal Court) said*:

Generally however the right approach should be ... that 'we must have regard to the trite maxim omnis nova constitution futuris forman imponere debet non praeteritis, that unless it is so expressed in the new law, a vested right is not taken away'.

In the present case there is no express provision in the new [AA] to take away the vested right acquired by the defendant under the arbitration agreement and [AA (1952)], to override the applicability s 30 [IA].

...

[40] *The [AA] is not meant to be applicable retrospectively. Section 51 [AA] is not an express provision to give a retrospective effect of [AA]. There is no express provisions in [AA] to give that effect. The defendant, by virtue of cl 63.5 of the arbitration*

agreement and s 25(2) [AA (1952)], does have an 'acquired, accrued or incurred' right to refer his dispute to the High Court. The [AA] cannot be interpreted to take away such right from him unless there are clear express provisions to that effect. There is no such express provisions in [AA]. (Emphasis added.)

(b) *Putrajaya Holdings has been followed by David Wong J (as he then was) in Hiap-Taih Welding & Construction Sdn Bhd v Boustead Pelita Tinjar Sdn Bhd (formerly known as Loagan Bunut Plantations Sdn Bhd)* [2008] 8 MLJ 471, at [14] to [16]. (Emphasis added.)

[20] Firstly, when I decided *Mammoth Empire Construction*, my attention was not drawn to:

(1) the fact that the Court of Appeal has affirmed the High Court's judgment in *AMDAC*. There is however no written judgment of the Court of Appeal in *AMDAC*; and

(2) the judgments in *Tokio Marine Insurans*, *Pembinaan Limbongan Setia* and *Johawaki Development*.

[21] I will now reconsider my earlier decision in *Mammoth Empire Construction* in light of the matters stated in the above para 20. The appeal to the Court of Appeal against my decision in *Mammoth Empire Construction* has been withdrawn after the delivery of my written judgment.

[22] Firstly, I am of the following view regarding the stare decisis doctrine:

(1) it is the ratio decidendi in the written judgment of a superior court (ratio decidendi (superior court)) and not the decision of the superior court itself which binds all lower courts. I use the term 'superior court' to refer to the Federal Court, Court of Appeal and High Court. I have decided as follows in *Syahin Hafiy Danial bin Soh Ahmad Luptepi Amin v Mansur bin Yunus & Anor* [2021] 8 MLJ 297 at [14] and [15]:

> [14] *I am not able to accept the reference by the defendant's learned counsel to other cases except if written judgments have been delivered in the other cases. This is because from the view point of the stare decisis doctrine, only the ratio decidendi ascertained from a written judgment of a superior court, has binding or persuasive effect. I refer to the judgment of Raja Azlan Shah FJ (as His Majesty then was) in the Federal Court case of Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29*, at 32 as follows*:
>
> > *However, I would once again emphasize what has so often been said before, that precedents are not to be slavishly followed; a case may be followed only for its strict ratio decidendi.* (Emphasis added.)
>
> *Without a written judgment of a previous case, the court cannot ascertain the ratio decidendi of the previous case by considering the following three matters (three matters)*:

(a) *the material facts of the case which give rise to the issue to be decided by the court*;

(b) *the rule of law which has been applied by the court to resolve the issue; and*

(c) *the reasoning of the court in applying the rule of law to decide the issue in question*.

[15] *In Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155*, the appellant's learned counsel referred to a digest, summary or extract of a previous decision, Heah Chin Kim. Suffian LP held as follows in the Federal Court in Datuk Haji Harun*, at p 170:

> *The full judgment in Heah Chin Kim [1954] MLJ xxxiii is not available and it is impossible for us to determine its ratio decidendi*. (Emphasis added.)

Based on Datuk Haji Harun, no reliance can be placed on a digest, summary or extract of a previous decision because the court cannot extract the ratio decidendi of the previous case by considering the 3 Matters. (Emphasis added.)

As explained in *Syahin*, since the Court of Appeal has not delivered a written judgment in *AMDAC*, there is therefore no *ratio decidendi* of the Court of Appeal's decision in *AMDAC* which binds all High Courts;

(2) when a written judgment of a lower court has been reversed or overruled by a higher court, the ratio decidendi of the lower court (ratio decidendi (lower court)) cannot be cited as an authority unless the ratio decidendi (lower court) has been subsequently restored or accepted by the ratio decidendi (superior court);

(3) if a lower court's decision is reversed by a higher court, the ratio decidendi (lower court) cannot have binding effect even though there is no written judgment of the higher court. the ratio decidendi (lower court) can only be cited as an authority if the ratio decidendi (superior court) subsequently restores or accepts the ratio decidendi (lower court); and

(4) a High Court judge or judicial commissioner (J/JC) is not bound by the ratio decidendi of a written judgment delivered by another J/JC — please refer to the judgment of Ong Hock Thye FJ (as he then was) in the Federal Court case of *Sundralingam v Ramanathan Chettiar* [1967] 2 MLJ 211 at p 213.

[23] In view of *Tokio Marine Insurans*, *Pembinaan Limbongan Setia* and *Johawaki Development*, I have reconsidered *Mammoth Empire Construction*. With respect, I maintain my opinion in *Mammoth Empire Construction*. My reasons are as follows:

(1) *AMDAC*, *Tokio Marine Insurans*, *Pembinaan Limbongan Setia* and *Johawaki Development* did not consider the effect of s 23 of the AA. By virtue of ss 23 and 42 AA read with s 30(1)(b) and (d) of the IA, when

SQA received the two notices to arbitrate (26 September 2017), LH and LY already had a vested 'right' and/or 'remedy' under s 42 of the AA to refer questions of law to the High Court which might subsequently arise from the award ('vested right/remedy (receipt of notice to arbitrate)');

(2) if I have followed *AMDAC*, *Tokio Marine Insurans*, *Pembinaan Limbongan Setia* and *Johawaki Development*, this is not only contrary to s 23 of the AA read with s 30(1)(b) and (d) of the IA but will also render redundant the vested right/remedy (receipt of notice to arbitrate). Furthermore, the effect of *AMDAC*, *Tokio Marine Insurans*, *Pembinaan Limbongan Setia* and *Johawaki Development* is to confer retrospective effect on Act A1569, namely, Act A1569 applies to all arbitral proceedings which have been commenced before 8 May 2018 (date of enforcement of Act A1569) and the awards have yet to be delivered on 8 May 2018;

(3) as explained in *Mammoth Empire Construction*, if the legislature had intended for the repeal of s 42 of the AA in Act A1569 to apply retroactively to all arbitrations which had been commenced before 8 May 2018 but the awards had not been delivered on 8 May 2018, the legislature could have easily stated as such in Act A1569. Parliament however did not provide as such in Act A1569; and

(4) the wording in s 42(1) AA ('Any party may refer to the High Court any question of law arising out of an award') merely concerns *when* a party may refer to the High Court questions of law which arises out of an award. The words in s 42(1) of the AA cannot support a statutory interpretation that Parliament has intended for Act A1569 to apply retrospectively to all arbitral proceedings which had been commenced before 8 May 2018 but the awards had not been delivered on 8 May 2021.

[24] Premised on the reasons expressed in the above para 23, I am constrained to dismiss SQA's PO (OS No 9) with costs.

F(2). Ten questions (OS No 9)

[25] The ten questions (OS No 9) are as follows:

(1) whether on the correct interpretation of cl 23 COC, the duty/responsibility to apply for EOT lies on SQA only ('question No 1 (OS No 9)');

(2) whether on the correct interpretation of cl 23.1 COC, the conditions precedent of giving notice for application of EOT must be fulfilled ('question No 2 (OS No 9)');

(3) whether on the correct interpretation of cl 23.1 COC, the failure of

SQA to give notice for application of EOT within the timeframe stipulated under cl 23.1 COC did not entitle SQA for any EOT ('question No 3 (OS No 9)');

(4) whether the arbitrator is bound by the principles under the decided precedents with regard to the same issue ('question No 4 (OS No 9)');

(5) whether the arbitrator has applied the correct principles and law in assessing SQA's application for EOT ('question No 5 (OS No 9)');

(6) whether on the correct interpretation of cl 24.1 COC, the condition precedent to give notice for direct loss and/or expense claim must be fulfilled by SQA ('question No 6 (OS No 9)');

(7) whether on the correct interpretation of cl 24.1 COC, the failure of SQA to give notice for direct loss and/or expense claim in accordance with the condition precedent under cl 24.1 COC did not entitle SQA to claim for any direct loss and/or expense ('question No 7 (OS No 9)');

(8) whether on the correct interpretation of cl 30.10(a) and cl 30.10(b) COC, the dispute or disagreement to the QS's SFA (first contract) and QS's SFA (second contract) must be by way of arbitration proceedings within the stipulated timeframe ('question No 8 (OS No 9)');

(9) whether under the requirements of law, SQA is responsible for the defect works in respect of scupper drain ('question No 9 (OS No 9)'); and

(10) whether the arbitrator has erred when he decided in a manner contradicting his own findings in the award ('question No 10 (OS No 9)').

F(3). Application of s 42 of the AA

[26] In *Zenbay Sdn Bhd v Yong Choo Kui Shipyard Sdn Bhd* [2015] MLJU 907; [2015] 10 CLJ 924 at [46], I have explained that the application of s 42 of the AA involves the following three stages:

> [46] Thirdly, *an application of s 42 AA concerns the following three matters*:
>
> (a) *whether a plaintiff has fulfilled certain threshold requirements under s 42 of the AA read with O 69 rr 2, 4 and 6 of the RC so as to confer jurisdiction on the court to determine the question of law referred to it. I will describe this preliminary stage as a 'threshold stage'*;
>
> (b) *if the threshold stage is resolved in favour of a plaintiff, the court may proceed to answer the question(s) of law referred to it. the court's determination of question(s) of law referred to it, will be described in this judgment as the 'determination stage'*; and
>
> (c) *if the question(s) of law is (are) determined against a plaintiff, the os will consequently be dismissed. if however the court answers the question(s) of law*

in favour of a plaintiff, the court nevertheless retains a discretion not to grant any relief as provided in s 42(4)(a) to (b) of the aa. i will refer to this final stage as the 'relief stage'. (Emphasis added.)

F(4). Did encl 9 fulfil threshold requirements?

[27] For the court to have jurisdiction to decide OS No 9 under s 42 of the AA, LH and LY have to fulfil all the following threshold requirements:

(1) s 42(1) of the AA mandatorily requires OS No 9 to raise questions of law and not factual issues. In the Federal Court case of *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1 at [117], [153] and [154], Jeffrey Tan FCJ has decided as follows:

Test under s 42

[117] *Under s 42(1) any party may refer to the High Court 'any question of law arising out of an award'. And under s 42A(1), 'The High Court shall dismiss a reference made under sub-s (1) unless the question of law substantially affects the rights of one or more of the parties'. The question of law must not only arise out of the award, but must substantially affect the rights of one or more of the parties. Short of one and the reference shall be dismissed.*

...

Question of fact

[153] *Where it is a question of fact, 'The arbitrators (remain) the masters of the facts. On an appeal the court must decide any questions of law arising from the award on the basis of full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers these findings to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be or what the scale of the financial correspondences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact' (The 'Baleares' at p 228). '... on findings of facts an arbitrator is the sole judge. Further, whether he drew the wrong inferences of facts from the evidence itself is not sufficient as a ground to warrant setting aside his award (see GKN Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Rep 555)' (*Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd* [2003] 1 MLJ 49 *per Richard Malunjum JCA, as he then was). '... if an arbitrator had erred by drawing wrong inferences of fact from the evidence before him, be it oral or documentary, that in itself is not sufficient to warrant setting aside of his award. It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and*

misunderstood' per Raja Azlan Shah J (as he then was) in Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210' (*Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401 *per Siti Norma Yaakob FCJ, as she then was, delivering the judgment of the court).*

[154] *'It is essential therefore to understand the basic difference between appeals in the court system from subordinate courts, where issues of 'weight of evidence' are routinely addressed, and references under s 42 [AA], where the court has no jurisdiction to entertain arguments based on weight of evidence … 'the parties will not be allowed to circumvent the rule that the tribunal's findings of fact are conclusive by alleging that they are inconsistent or they constitute a serious irregularity or an excess of jurisdiction, or on the basis that there was insufficient evidence to support the findings in question. The argument that it is a question of law whether there is material to support a finding of fact is no longer available'* (*Russell on Arbitration* (1997) at pp 8-057)' (The Arbitration Act 2005 at pp 198–199). (Emphasis added.)

Tengku Maimon JCA (as she then was) has decided in the Court of Appeal case of *Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd v Sunway City Sdn Bhd* [2019] 2 MLJ 495, at [43], that a question of mixed law and fixed cannot be referred to the High Court under s 42 of the AA. Hence, only pure questions of law can be referred to the High Court pursuant to s 42 of the AA;

(2) according to s 42(1) of the AA, the pure question of law must arise out of the award itself and not from the arbitral proceedings — please refer to Mohamad Ariff Yusoff JCA's judgment in the Court of Appeal in *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126 at pp 145–146; [2015] 1 CLJ 617 at p 637. In other words, if the pure legal question does not appear on the face of the award, the court has no jurisdiction to decide the legal issue under s 42(1) of the AA even though the legal question may have been raised in:

(a) a claimant's statement of claim (points of claim), claimant's reply to respondent's defence (points of defence) and claimant's defence to respondent's counterclaim;

(b) a respondent's defence, respondent's counterclaim and respondent's rejoinder (if allowed by arbitral tribunal);

(c) witness statements and documents adduced in arbitral proceedings;

(d) notes of evidence taken in arbitral proceedings; and

(e) written submissions filed by parties in the arbitration; and

(3) it is a mandatory requirement of s 42(1A) of the AA that the pure question of law should 'substantially affects the rights of one or more of the parties' in the arbitration. The meaning of this threshold requirement has been explained by Mary Lim J in *MMC Engineering*

Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd [2015] 10 MLJ 689 pp at [37]–[39], as follows:

> [37] *Although the court's powers under s 42 is discretionary, this discretion is curtailed when one of the conditions for intervention of the court is not fulfilled, and that is where the plaintiffs are unable to show how the question of law substantially affects the rights of one or more of the parties as mandated by sub-s 42(1A). The term 'parties' here must necessarily and logically refer to or include the plaintiffs; otherwise it makes no practical sense for the plaintiffs to seek the intervention of the court …*
>
> [38] *Again, there is no definition on this requirement. There is however, some indication of what the term may include in the decision of Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 2 SLR 609. *In that case, the Singapore Court of Appeal accepted the interpretation of the expression 'substantially affect the rights' by Lord Denning in the Court of Appeal in 'The Nema' [1980] QB 547, at p 564; that it refers to 'a point of practical importance — not an academic point — nor a minor point'*.
>
> [39] *This decision was followed in Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd where the Court of Appeal recognised that '… the question as to how 'substantially' was to be measured, remained. Whether a claim was substantial or not can sometimes be considered in absolute terms. We could arbitrarily say that $10 is insubstantial. There will come a point where one might not be able to declare confidently that the given sum is substantial or otherwise, without considering the context of the claim … In The Evimera* [1982] 1 Lloyd's Rep 55, *the court was of the view that the claim for $20,000 was not substantial in the context of that case … We agree with the court in The Evimera that the granting of leave is a discretionary exercise and as such, is not governed by rules, provided that the statutory criteria are satisfied … The question of substantiality is largely a matter of discretion at case'. I am of the view that this is interpretation holds equally true for s 42 which has the same requirement. I am also of the view that there must be evidence presented or at the very least a claim or an assertion in the cause papers including the affidavits filed in support to the effect that the applicant's rights have been affected substantially by the arbitration award; and an explanation as to how those rights are affected substantially.* (Emphasis added.)

F(4A). Whether question No 5 (OS No 9), question No 9 (OS No 9) and question No 10 (OS No 9) are pure legal issues

[28] Firstly, question No 10 (OS No 9) is a factual issue (whether there are contradictions in the arbitrator's findings in the award) which cannot be referred to the High Court under s 42(1) of the AA.

[29] Secondly, question No 5 (OS No 9) is an issue of mixed law and fact because whether the arbitrator had applied the correct legal principles in deciding the validity of SQA's EOT applications, must depend on the evidence adduced by SQA, LH and LY with regard to SQA's EOT applications.

Similarly, question No 9 (OS No 9) is also an issue of mixed law and fact. This is because whether SQA was responsible for the rectification works under the two contracts would depend on the nature of the defects in the works and the causes of such defects. Premised on *Sykt Pembenaan Yeoh Tiong Lay*, question No 5 (OS No 9) and question No 9 (OS No 9) are not pure legal issues. As such, the court has no jurisdiction to decide question No 5 (OS No 9) and question No 9 (OS No 9) pursuant to s 42(1) of the AA.

F(4B). Did question No 1 (OS No 9) to question No 4 (OS No 9), question No 8 (OS No 9) and question No 10 (OS No 9) arise from award?

[30] Question No 1 (OS No 9) to question No 4 (OS No 9), question No 8 (OS No 9) and question No 10 (OS No 9) did not arise from the award. On this ground alone, the court cannot decide these questions under s 42(1) of the AA.

F(4C). Whether question No 1 (OS No 9) to question No 8 (OS No 9) substantially affect rights of LH and LY

[31] Question No 1 (OS No 9) to question No 3 (OS No 9) concern cl 23 COC. According to learned counsel for LH and LY, SQA did not comply with the conditions precedent stipulated in cl 23 COC for SQA to make EOT applications. Consequently, SQA was not entitled to any EOT under the two contracts. I am unable to see how question No 1 (OS No 9) to question No 3 (OS No 9) substantially affect the rights of LH and LY in the arbitration because:

(1) cl 34.8(e) COC has expressly conferred power on the arbitrator 'to determine all matters in dispute submitted to [the arbitrator] in the same manner as if no such ... requirement or notice has been given'; and

(2) the commercial purpose of cll 23.1, 23.2 and 23.3 COC was for SQA to give sufficient particulars of SQA's EOT applications and sufficient time for the architect to decide SQA's EOT applications on their merits. The architect in this case did consider SQA's EOT applications on their merits and did not dismiss SQA's EOT applications merely on the ground that SQA had failed to comply with cl 23 COC. In other words, any non-compliance with cl 23 COC by SQA was immaterial to the architect.

[32] I am of the view that LH and LY cannot contend that question No 4 (OS No 9) and question No 5 (OS No 9) substantially affect the rights of LH and LY in the arbitration because the arbitrator had already given cogent reasons in deciding the third issue (arbitration) and related question to third issue (arbitration) regarding SQA's EOT applications.

[33] Question No 6 (OS No 9) and question No 7 (OS No 9) concern the application of cl 24.1 COC. It has been submitted by learned counsel for LH and LY that SQA did not comply with cl 24.1 COC in claiming for SQA's total loss due To EOTs. I cannot accept this contention because notwithstanding SQA's failure to give any notice to the architect pursuant to cl 24.1 COC, cl 34.8(e) COC empowers the arbitrator to decide on SQA's total loss due To EOTs.

[34] By way of question No 8 (OS No 9), learned counsel for LH and LY has contended that SQA could only dispute the contents of the architect's 'Final Account' by compliance with the requirements laid down in cll 30.10(a) and 30.10(b) COC. Premised on cl 34.8(e) COC, I have no hesitation to decide that question No 8 (OS No 9) does not substantially affect the rights of LH and LY in the arbitration.

F(4D). Was amended OS No 9 an appeal against award?

[35] In view of the reasons stated in the above Parts F(4A) to F(4C), amended OS No 9 has failed to fulfil the threshold requirements as stipulated in s 42(1) and (1A) of the AA. Accordingly, I am constrained to dismiss amended OS No 9 without answering the ten questions (OS No 9) ('determination stage') — please refer to *Zenbay*. I also accept the submission by SQA's learned counsel that in reality, amended OS No 9 is actually an appeal by LH and LY to the High Court to set aside the award under the guise of an application under s 42 of the AA.

F(5). How should court answer ten questions (OS No 9)?

[36] I shall now assume that amended OS No 9 has complied with all the threshold requirements. Consequently, this court shall now proceed to the determination stage. I have no hesitation to decide the determination stage in favour of SQA against LH and LY as follows:

(1) with regard to question No 1 (OS No 9) to question No 3 (OS No 9), in view of cl 34.8(e) COC and the commercial objective of cl 23, any non-compliance with cl 23 COC by SQA in this case is immaterial. This court thereby declines to answer question No 1 (OS No 9) to question No 3 (OS No 9);

(2) the answer to question No 4 (OS No 9) must be positive because the arbitrator is bound by previous cases which have the same or similar contractual provisions as the two contracts. Having said that, as explained in the above para 32, the answer to question No 5 (OS No 9) must be 'yes';

(3) question No 6 (OS No 9) to question No 8 (OS No 9) are irrelevant in the arbitration due to the application of cl 34.8(e) COC — please refer to the above paras 33–34. There is therefore no necessity to answer question No 6 (OS No 9) to question No 8 (OS No 9);

(4) as explained in the above para 28, question No 10 (OS No 9) is a factual issue and the arbitrator was the 'master of facts' — please refer to *Far East Holdings*. It is thus beyond the court's jurisdiction under s 42(1) of the AA to answer question No 10 (OS No 9); and

(5) question No 5 (OS No 9) and question No 9 (OS No 9) are issues of mixed law and fact which should not be answered by this court — please refer to the above para 29.

F(6). Should court grant relief in amended OS (No 9)?

[37] Even if it is assumed that the ten questions (OS No 9) are pure questions of law which arise out of the award and substantially affect the rights of LH and/or LY in the arbitration, I am not inclined to exercise my discretion to grant any remedy to LH and/or LY under s 42(4)(b)–(d) of the AA because I am not persuaded that any injustice has been caused to LH and/or LY in the arbitration.

F(7). Court's decision on amended OS No 9

[38] Due to the reasons elaborated in the above Parts F(3) to F(6), I am constrained to dismiss amended OS No 9.

G. OS NO 10

[39] I reproduce below the relevant parts of ss 8, 20, 21, 36 and 37 of the AA:

s 8 *Extent of court intervention*

No court shall intervene in any of the matters governed by this Act, except where so provided in this Act.

s 20 Equal treatment of parties

The parties shall be treated with equality and each party shall be given a fair and reasonable opportunity of presenting that party's case.

s 21 *Determination of rules of procedure*

(1) *Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*

(2) *Where the parties fail to agree under subsection (1), the arbitral tribunal may, subject to the provisions of this Act, conduct the arbitration in such manner as it considers appropriate.*

(3) *The power conferred upon the arbitral tribunal under subsection (2) shall include the power to —* **A**

...

(b) *draw on its own knowledge and expertise*;

... **B**

(i) *make such other orders as the arbitral tribunal considers appropriate*.

s 36 *An award is final and binding*

(1) *An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set-off or otherwise in any proceedings in any court*. **C**

s 37*Application for setting aside*

(1) *An award may be set aside by the High Court only if —* **D**

(a) *the party making the application provides proof that —*

...

(iv) *the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration*; **E**

(v) *subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration*;

...; or

(b) *the High Court finds that —* **F**

(i) ...; or

(ii) *the award is in conflict with the public policy of Malaysia.*

(2) *Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where —* **G**

(a) ...; or

(b) *a breach of the rules of natural justice occurred —*

(i) *during the arbitral proceedings*; or **H**

(ii) *in connection with the making of the award*. (Emphasis added.)

[40] Learned counsel for LH and LY has submitted that the arbitrator had 'breached the rules of natural justice by acting in excess of his jurisdiction' when the arbitrator decided as follows in the award: **I**

(1) according to the arbitrator in paras 151 to 152 award, the concept of 'three part chain of causation' was only a formalization of the architect's thought process in the architect's assessment of SQA's EOT applications; and

(2) in paras 321 and 322 award, the arbitrator had 'imposed additional and unnecessary obligation which is not found in [PAM Contract 2006]'.

[41] With respect to learned counsel for LH and LY, the following three grounds are separate grounds for the court to exercise its discretion to set aside an arbitral award:

(1) when an arbitral tribunal had decided on a dispute or issue which had not been contemplated by or had not fallen within the terms (submission to arbitration) as understood in s 37(1)(a)(iv) of the AA;

(2) when an arbitral award contained any decision on a matter which was beyond the scope of the terms (submission to arbitration) within the meaning of s 37(1)(a)(v) of the AA; and

(3) whether an arbitral tribunal had breached the first rule and/or second rule as stipulated in s 37(1)(b)(ii), (2)(b)(i) and (ii) of the AA.

[42] Learned counsel for LH and LY should not have conflated the three separate grounds to set aside an arbitral award as stated in the above para 41.

G(1). Whether LH and LY can rely on s 37(1)(a)(iv) and (v) AA

[43] Firstly, paras 151–152 award regarding the 'three part chain of causation' constituted part of the arbitrator's reason and/or reasoning for the arbitrator's decision on the third issue (arbitration) ('arbitrator's reason/reasoning (third issue)'). Those paragraphs in the award were not the arbitrator's decision for the third issue (arbitration).

[44] Secondly, paras 321 and 322 award concerned part of the reason and/or reasoning of the arbitrator when the arbitrator decided the fifth issue (arbitration) ('arbitrator's reason/reasoning (fifth issue)'). Once again, the arbitrator's reason/reasoning (fifth issue) is to be distinguished from the arbitrator's determination of the fifth issue (arbitration).

[45] The third issue (arbitration) clearly arose from the terms (submission to arbitration), namely:

(1) LY's re-amended points of claim ('RPOC') pursuant to the first contract;

(2) SQA's amended points of defence and counterclaim ('APDCC') regarding the first contract;

(3) LY's RPOC for the second contract; and

(4) SQA's APDCC in respect of the second contract.

[46] The fifth issue (arbitration) fell within the terms (submission to arbitration), ie, the documents stated in the above para 45.

[47] I am of the view that s 37(1)(a)(iv) and/or (v) of the AA can only be invoked if an arbitral tribunal has decided on an issue or matter which is beyond the terms (submission to arbitration). So long as an arbitral tribunal has decided on an issue or matter which is within the terms (submission to arbitration), the arbitral tribunal may give any reason and/or reasoning for the decision as the arbitral tribunal deems just and appropriate. Furthermore, by reason of s 21(3)(b) of the AA, an arbitrator may draw on his or her 'own knowledge and expertise' — please refer to the Federal Court's judgment delivered by Abdul Rahman Sebli FCJ in *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal* [2021] 1 MLJ 1, at [3], [34], [54], [62]–[64], [78], [82], [90]–[91] and [99]–[102].

[48] As the arbitrator had not decided on a question or matter which had not been contemplated by or had not fallen within the terms (submission to arbitration), LH and LY cannot rely on s 37(1)(a)(iv) and (v) of the AA to support OS No 10.

G(2). Two rules of natural justice ('two rules')

[49] I have decided as follows in *Ragawang Corporation Sdn Bhd v One Amerin Residence Sdn Bhd and other cases* [2022] MLJU 2121, at [30] and [31]:

> [30] *As explained by Lord Denning in delivering the judgment of the Privy Council in an appeal from the Federation of Malaya, Surinder Singh Kanda v Government of the Federation of Malaya* [1962] 1 MLJ 169*, at 172, there are two rules of natural justice (two rules), namely*:
>
> (1) *the first rule, ie, the rule against bias; and*
>
> (2) *the second rule which embodies the right to be heard.*
>
> [31] *I am of the following view regarding the application of the two rules and s 20 AA*:
>
> (1) *s 20 AA imposes the following two duties on arbitrators* (*two duties (s 20 of the AA)) —*
>
> (a) *an arbitrator 'shall' treat all parties equally* (first duty (s 20 of the AA)*); and*
>
> (b) *each party 'shall' be given by an arbitrator a fair and reasonable opportunity of presenting that party's case (second duty (s 20 of the AA));*

(2) *the first duty (s 20 AA) falls within the first rule. the first rule is wider than the first duty (s 20 AA). This is because even if an arbitrator has actually treated equally all parties (ie, the fulfilment of the first duty (s 20 AA)), the first rule may still be breached by the arbitrator if there is biasness, partiality or lack of independence on the part of the arbitrator in the objective perception of a 'fair-minded and informed observer' — please refer to the judgment of Lord Hodge DPSC in United Kingdom's Supreme Court in Halliburton Co v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) & Ors (International Court of Arbitration of the International Chamber of Commerce & Others Intervening)* [2020] 3 WLR 1474, at [52];

(3) *the second rule includes the second duty (s 20 AA) and is wider than the latter. For example, even if an arbitrator has fulfilled the second duty (s 20 AA) by giving all the parties a 'fair and reasonable opportunity' of presenting their cases, the second rule may still be breached if, for example, an arbitrator makes an award based on a matter which is the arbitrator's own 'invention or idea' — please refer to the judgment of VK Rajah JA in Singapore's Court of Appeal in Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86, at [29] and [41];

(4) *in deciding whether the two rules and/or two duties (s 20 AA) have been breached or not, the court should consider the following two matters —*

(a) *by reason of s 21(3)(b) of the AA, an arbitrator may draw on his or her 'own knowledge and expertise' — please refer to the Federal Court's judgment delivered by Abdul Rahman Sebli FCJ in Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal* [2021] 1 MLJ 1*, at [3], [34], [54], [62]–[64], [78], [82], [90]–[91] and [99]–[102]; and*

(b) *an arbitrator is the master of arbitral procedure to be adopted in the arbitration ('arbitrator is Master of Procedure' Concept). The 'arbitrator is Master of Procedure' Concept is clear from the following —*

(i) *according to s 21(2) of the AA, an arbitrator may 'conduct the arbitration in such manner as [the arbitrator] considers appropriate'*

(ii) *s 21(3)(i) of the AA empowers an arbitrator to 'make such other orders as the [arbitrator] considers appropriate'; and*

(iii) *in the High Court case of Ranhill Bersekutu Sdn Bhd v Safege Consulting Engineers & Anor* [2004] 3 MLJ 554*, at [15], Raus Sharif J (as he then was) has decided as follows*:
[15] It is settled law that an arbitrator is the master of procedure to be followed in an arbitration and he has complete and unfettered discretion in the matter. The House of Lords in the case of Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corpn [1981] 1 All ER 289 *(refd) (HL) held that, at p 301:*
... By appointing a sole arbitrator pursuant to a private arbitration agreement which does not specify expressly or by reference any particular procedural rules, the parties make the arbitrator the master of the procedure to be followed in the arbitration ... he has complete discretion to determine how the arbitration is to be conducted from the time of his appointment to the time of his award, so long as the procedure he adopts does not offend the rule of natural justice. (Emphasis added.)

(5) *if there is a breach of any one of the two rules and/or two duties (s 20 AA) [Breach (two rules/s 20 AA)), the breach (two rules/s 20 AA) in itself does not mean that ipso facto the court shall set aside an arbitral award under s 37(1)(b)(ii), (2)(b)(i) and/or (ii) AA. This is clear from the following two Federal Court cases (in chronology)*:

(a) in *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413*, at [55] and [58], Ramly Ali FCJ has decided as follows (Test (Jan De Nul)):*

[55] *Section 37(2)(b)(ii) [AA] provides that an award made by an arbitral tribunal would be in conflict with the public policy of Malaysia if a breach of the rules of natural justice occurred in connection with the making of the award. The circumstances stated in s 37(2) are by no means exhaustive. Other appropriate circumstances may also fall under the category of 'public policy' in view of the opening phrase 'without limiting the generality of sub-para (1)(b)(ii)' as appears in s 37(2) [AA]. However, it must be appreciated that the concept of public policy generally is itself a broad concept. But in applying the concept for the purpose of setting aside an award under s 37 [AA], the concept of public policy ought to be read narrowly and more restrictively. The court's intervention should be sparingly used. The court must be compelled that a strong case has been made out that the arbitral award conflicts with the public policy of Malaysia. As clearly stated by the Court of Appeal in Sigur Ros (with which we agree): 'The concept of public policy must be one taken in the higher sense where some fundamental principle of law or justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the court's process or powers will be abused'.*

...

[58] *The scope of public policy ground for setting aside an arbitral award could only be invoked in deserving case ie in instances where it appears a violation of the most basic notions of morality and justice. It covers fundamental principles of law and justice in substantive as well as procedural respect. Instances where the upholding of an arbitral award would shock the conscience, or clearly injurious to the public good, or wholly offensive to the ordinary reasonable and fully informed member of the public, had been held by courts in various jurisdiction to fall within the category of public policy ground for setting aside an arbitral award. Thus, instances such as 'patent injustice', 'manifestly unlawful and unconscionable', substantial injustice', 'serious irregularity' and other similar serious flaws in the arbitral process and award, would also fall within the applicable concept of public policy and therefore by virtue of s 37(1)(b)(ii) [AA] when proven, can be a ground for the court to exercise its discretion to set aside the award (see: Ajwa for Food Industries). Such instances fall within 'the basic and fundamental notions or principles of justice'. The court must adopt the principle as laid down by Howard M Holtzmann and Joseph E Neuhans as found in their commentary in A guide to the UNCITRAL Model on International Commercial Arbitration: Legislative History and Commentary 'that the term 'public policy' which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects'. The terms 'patent injustice' or 'substantial injustice' or 'manifestly unlawful and unconscionable' as often used by the court in setting aside arbitral awards, do not mean injustice which is more than de minimis; what is required is that the injustice had real effect and had prejudiced the basic right of the applicant (see: Soh Beng Tee*

& Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR 86). (Emphasis added.); and

(b) *according to Vernon Ong FCJ in Master Mulia Sdn Bhd v Sigur Ros Sdn Bhd [2020] 12 MLJ 198, at [53] and [58] [Test (Master Mulia)]:*

[53] *In the light of the above, we think that the guiding principles on the exercise of residual discretion when an application for setting aside an award is grounded on breach of natural justice may be stated as follows*:

First, the Court must consider (a) which rule of natural justice was breached; (b) how it was breached; and (c) in what way the breach was connected to the making of the award;

Second, the court must consider the seriousness of the breach in the sense of whether the breach was material to the outcome of the arbitral proceeding;

Third, if the breach is relatively immaterial or was not likely to have affected the outcome, discretion will be refused;

Fourth, even if the court finds that there is a serious breach, if the fact of the breach would not have any real impact on the result and that the arbitral tribunal would not have reached a different conclusion the court may refuse to set aside the award;

Fifth, where the breach is significant and might have affected the outcome, the award may be set aside;

Sixth, in some instances, the significance of the breach may be so great that the setting aside of the award is practically automatic, regardless of the effect on the outcome of the award;

Seventh, the discretion given the Court was intended to confer a wide discretion dependent on the nature of the breach and its impact. Therefore, the materiality of the breach and the possible effect on the outcome are relevant factors for consideration by the Court; *and*

Eighth, whilst materiality and causative factors are necessary to be established, prejudice is not a pre-requisite or requirement to set aside an award for breach of the rules of natural justice.

...

[58] *This reading is supported by the case law in New Zealand where the setting aside provision on the NZ Act mirrors s 37 [AA]. Like s 37(2)(b) [AA], Article 34(6)(b), Schedule 1 of the NZ Act does not stipulate the requirement of prejudice (Kyburn; Trustees of Rotoaira Forest Trust v Attorney General [1999] 2 NZLR 452). To reiterate, these decisions make the following points. First, the imposition of a requirement of prejudice narrows down what is intended to be a wide discretion (Kyburn at p 564); Second, provisions allowing for the setting aside of arbitral awards can be said to vest in the court a wide discretion to set aside awards. The question of whether an award ought to be set aside for breach of natural justice therefore does not turn on prejudice. It turns, instead, on amongst other things, the significance of the breach and the extent to which it might or may have affected the outcome of the arbitration. It is not necessary to show that the breach did in fact affect*

the outcome (Kyburn at p 653). Procedural prejudice would be sufficient to ground an application to set aside (Rotaoira at p 462). Fourth, there is no basis on which it can be said that the onus is on the applicant to show that the consequences of the breach are sufficiently material to warrant setting aside an award. The ordinary burden on an applicant cannot be elevated to a legal requirement to show that the outcome would be different had the breach not occurred (Kyburn at p 654). Fifthly, materiality of the breach and the possible effect on the outcome are treated as relevant factors going to the exercise of the discretion, such as the likely costs of holding a re-hearing (Kyburn at p 654). Lastly, prejudice, if it can be shown, would be material. However, no single factor is decisive or necessary for an award to be set aside (Kyburn at p 654). Kyburn was cited with approval by this Court in Jan De Nul (M) Sdn Bhd). We are in agreement with the view expressed by the Court of Appeal that the threshold under s 37 is very low as compared to that under s 42 [AA] (see para [38] of the Court of Appeal's written judgment). (Emphasis added.)

(6) *by reason of Parliament's employment of the permissive term 'may' in s 37(1) AA, the court has a discretion to set aside an arbitral award under any one of the grounds stipulated in s 37(1)(a)(i) to (vi), (b)(i) and (ii) AA. Needless to say, the exercise of the court's discretion to set aside an arbitral award under s 37(1) AA depends on the particular facts of the case in question. Consequently, from the view point of stare decisis doctrine, cases regarding the setting aside of arbitral awards, strictly speaking, do not constitute binding legal precedents.*

(7) *according to s 36(1) AA, arbitral awards are final (First Consideration). Parliament has not provided any appeal to the court against an arbitral award (Second Consideration). An application to set aside an arbitral award under s 37(1) AA [Section 37(1) Application] is not an appeal to the court against the arbitral award (Third Consideration). Nor is a Section 37(1) Application a Judicial Review of an arbitral award (Fourth Consideration). Section 8 AA is clear that the court 'shall' not intervene in any matter governed by AA unless so provided in AA (Fifth Consideration). In view of the first to fifth Considerations, the court should not review or revisit the merits of an arbitral award in a Section 37(1) Application, lest the Section 37(1) Application is in substance an 'appeal' against the arbitral award under the guise of a Section 37(1) Application; and*

(8) *the legal and evidential burdens to persuade the court to set allow a Section 37(1) Application are solely on the applicant.* (Emphasis added.)

G(3). Did arbitrator breach second rule?

[50] According to learned lead counsel for LH and LY, the arbitrator had breached the second rule in this case as follows:

(1) the arbitrator did not consider the submissions made by LH and LY in the arbitration;

(2) the arbitrator had applied his own knowledge and experience in the interpretation of cll 24.1, 30.10(a) and (b) COC without giving the parties an opportunity to submit on the same; and

(3) the arbitrator acted in excess of his jurisdiction regarding two matters which had been stated in the above para 40.

[51] I am of the view that the second rule had not been breached by the arbitrator. My reasons are as follows:

(1) the arbitrator had given LH and LY their right to adduce evidence and to submit on all the five issues (arbitration);

(2) so long as the arbitrator had decided on the five issues (arbitration), the second rule did not require the arbitrator to decide in the award with regard to each and every submission of LH and LY;

(3) the second rule did not require the arbitrator to accept the reasons and/or reasoning of the parties as adduced by the parties through their witnesses and written submissions in the arbitration. This is because as explained by Abdul Rahman Sebli FCJ (as he then was) in the Federal Court case of *Pancaran Prima*, at [3], [34], [54], [62]–[64], [78], [82], [90], [91] and [99] to [102], the arbitrator could rely on his own knowledge and expertise. Consequently, the arbitrator could give reasons and/or reasoning in the award which were different from the submission of parties in the arbitration;

(4) the arbitrator's rejection of certain evidence and/or contentions advanced by LH and LY in the arbitration, in itself, does not amount to a breach of the second rule by the arbitrator. If otherwise, a party who has lost an arbitration can simply allege that the arbitral tribunal has contravened the second rule by the arbitral tribunal's mere dismissal of the party's evidence and/or submission; and

(5) it is to be noted that in this case, the arbitrator had accepted the following submissions by LH and LY:

(a) the arbitrator decided that QS's valuations (variation works) in QS's SFA (first Contract) and QS's SFA (second contract) were final and conclusive. Consequently:

(i) SQA could not claim for variation works (first contract) and variation works (second contract); and

(ii) the second issue (arbitration) was determined in favour of LH and LY; and

(b) with regard to part of the fifth issue (arbitration), the arbitrator held that there were Defects (rooftop ponding) wherein SQA was liable for rectification cost (rooftop ponding).

[52] As explained in the above para 51, the arbitrator did not breach the second part of s 20 AA (*each party shall be given a fair and reasonable opportunity of presenting that party's case*) ('second part (s 20 of the AA)').

[53] Alternatively or additionally, I am not satisfied that LH and LY have succeeded to discharge the legal and evidential burden to prove that the arbitrator had breached the second rule and/or second part (s 20 of the AA).

G(4). Whether arbitrator had contravened first rule

[54] Learned counsel for LH and LY has invited the court to decide that the first rule had been breached by the arbitrator based on the following contentions ('alleged arbitrator's breach (first rule)'):

(1) before the award, the arbitrator had pre-decided in favour of SQA against LH and LY ('alleged arbitrator's pre-award') when the arbitrator:

(a) made certain statements in the presence of learned counsel for LH, LY and SQA as well as the witness who was giving evidence at the time in question; and

(b) posed certain questions to witnesses.

The alleged arbitrator's pre-award took place as follows:

(i) when Mr. Koh Kok Seong, the second witness for LH and LY, was cross-examined by SQA's learned counsel on 23 October 2019;

(ii) during the cross-examination of Mr Chong Yi Puil, the third witness for LH and LY (CW3), by learned counsel for SQA on 23 October 2019;

(iii) when CW3 was re-examined by learned counsel for LH and LY on 13 November 2019;

(iv) when learned counsel for LH and LY cross-examined Mr Lim Keng Lui, SQA's the second witness (RW2), on 17 July 2020 (the alleged arbitrator's pre-award took place on two separate occasions on 17 July 2020) and 24 July 2020; and

(v) during the 'hot-tubbing' session ('hot-tubbing session') when Mr Wong (expert for LH and LY) and Mr Chung (SQA's expert) gave expert testimonies on 21 August 2020 (the alleged arbitrator's pre-award happened on many occasions in the hot-tubbing session).

(2) at the hot-tubbing session, the arbitrator allowed SQA's learned counsel to answer for Mr Chung; and

(3) on 24 July 2020, the arbitrator 'prevented' learned counsel for LH and LY from cross-examining RW2 regarding SQA's EOT applications because according to the arbitrator, those questions should be posed to the two experts, Mr Wong and Mr Chung ('two experts'), when the hot-tubbing session

commenced subsequently. However, on the same day, in the subsequent hot-tubbing session, the arbitrator held that the two experts were not architects who could give expert opinions on EOT. Hence, there was a self-contradiction in the arbitrator's conduct of the arbitration ('alleged arbitrator's self-contradiction').

[55] It is decided in *Ragawang Corporation*, at [34], as follows:

> [34] *In deciding whether an arbitrator has breached the first rule and/or first Duty (Section 20 AA), I am of the following opinion*:
>
> (1) *the court should first decide whether there is actual biasness, partiality or lack of independence on the part of the arbitrator (Actual Biasness); and*
>
> (2) *if there is no Actual Biasness, the court should then decide whether there is biasness, partiality or lack of independence on the arbitrator's part in the objective view of a 'fair-minded and informed observer' (Perceived Biasness) — Halliburton. In deciding the existence of Perceived Biasness, the following three tests (3 Tests) are applicable*:
>
> (a) *the 'reasonable suspicion of bias' test has been applied by the High Court in the following two cases*:
>
> (i) *the judgment of Nik Hashim J (as he then was) in Kuala Ibai Development Sdn Bhd v Kumpulan Perunding (1988) Sdn Bhd & Anor [1999] 1 CLJ 632, at 641–642; and*
>
> (ii) *Lee Swee Seng JC's (as he then was) decision in Dato Dr. Muhammad Ridzuan bin Mohd Salleh & Anor v Syarikat Air Terengganu Sdn Bhd [2012] 3 MLJ 737, at at [30] and [31];*
>
> (b) *the 'real danger of bias' test — please refer to, eg., the Federal Court's judgment delivered by Edgar Joseph Jr FCJ in Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65*, at 128-129; or*
>
> (c) *the 'real possibility of bias' test has been applied by Hasan Lah FCJ in the Federal Court case of the 'real possibility of bias' test has been applied by Hasan Lah FCJ in the Federal Court case of Bar Council v Tun Dato' Seri Arifin Bin Zakaria & Ors* [2020] 4 MLJ 773*, at [35].* (Emphasis added.)

[56] Firstly, the notes of evidence of the arbitration ('NOE') should be considered in totality. The court should not only peruse certain passages in the NOE which showed the alleged arbitrator's breach (first rule), including the alleged arbitrator's pre-award and alleged arbitrator's self-contradiction.

[57] After perusing the NOE in totality, I am satisfied that there was no actual biasness, actual partiality and/or actual lack of independence on the part of the arbitrator in this case. This decision is fortified by the following reasons:

(1) the arbitrator had a discretion to ask questions in the arbitration ('arbitrator's questions'). The arbitrator's questions are made so as to enable the arbitrator to decide the arbitration in a just manner;

(2) witnesses were at liberty to answer the arbitrator's questions;

(3) learned counsel for LH and LY could question witnesses regarding their answers to the arbitrator's questions;

(4) any statement made by the arbitrator in the arbitration ('arbitrator's statements') did not *ipso facto* mean that the arbitrator had made a Pre-award. More importantly, learned counsel for LH and LY could have replied or corrected the arbitrator's statements in the arbitration; and

(5) irrespective of the arbitrator's questions and arbitrator's statements, learned counsel for LH and LY are at liberty to draft written submission to support the contentions of LH and LY in the arbitration. In other words, LH and LY did not suffer any injustice due to the arbitrator's questions and arbitrator's statements.

[58] Secondly, with regard to the issue of whether there is perceived biasness, perceived partiality or perceived lack of independence on the arbitrator's part in this case, premised on the reasons stated in the above sub-paras 57(1)–(5), I am satisfied that in the objective view of a 'fair-minded and informed observer' who has taken into consideration the entire NOE and the alleged arbitrator's breach (first rule) (including the alleged arbitrator's pre-award and alleged arbitrator's self-contradiction):

(1) there is no 'real danger of bias' on the arbitrator's part in the arbitration;

(2) no 'reasonable suspicion of bias' on the part of the arbitrator can arise in this case; and/or

(3) there can be no 'real possibility of bias' by the arbitrator in the arbitration.

[59] A reading of the entire NOE does not disclose any breach of the first part of s 20 of the AA (the parties shall be treated with equality) ('first part (s 20 of the AA)'). This decision is fortified by the reasons expressed in the above sub-paras 57(1)–(5).

[60] Lastly, I am of the view that LH and LY have failed to discharge the legal and evidential burden to prove that the arbitrator had breached the first rule and/or first part (s 20 of the AA) in this case.

G(5). Should court set aside award?

[61] For the sake of completeness, the court will now assume that the arbitrator had breached the two rules and/or s 20 of the AA ('arbitrator's breaches').

[62] I have no hesitation to decide that despite the arbitrator's breaches, this court should not exercise its discretion to set aside the award under s 37(1)(b)(ii), (2)(b)(i) and/or (ii) of the AA. The following reasons support this decision:

(1) applying the test laid down by Ramly Ali FCJ in the Federal Court case of *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413, at [55] and [58], I am of the following view:

(a) the arbitrator has not violated 'the most basic notions of morality and justice' in making the award;

(b) the award would not 'shock the conscience';

(c) the award is not 'injurious to the public good';

(d) the award is not 'wholly offensive to the ordinary reasonable and fully informed member of the public';

(e) there is no 'patent injustice' to LH and LY in the arbitration and award;

(f) the arbitration and award are not 'manifestly unlawful and unconscionable'; and

(g) there is no 'substantial injustice', 'serious irregularity' and other 'similar serious flaws' in the arbitration and award.

(2) based on the test expounded by Vernon Ong FCJ in the Federal Court in *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd* [2020] 12 MLJ 198 at [53] and [58]:

(a) the nature of the arbitrator's breaches was not serious in the sense that the arbitrator's breaches were not material to the outcome of the arbitration; and

(b) even if the arbitrator's breaches were serious, the arbitrator's breaches would not have any real impact on the award. In other words, notwithstanding the arbitrator's breaches, the arbitrator would still have arrived at the award.

G(6). Decision in OS No 10

[63] In view of the reasons stated in the above Parts G(1) to G(5), OS No 10 must be refused.

H. OS NO 8

[64] The relevant parts of ss 38 and 39 of the AA are reproduced below:

s 38 *Recognition and enforcement*

(1) *On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.*

s 39 *Grounds for refusing recognition or enforcement*

(1) *Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked —*

(a) *where that party provides to the High Court proof that —*

(i) *a party to the arbitration agreement was under any incapacity*;

(ii) *the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia*;

(iii) *the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case*;

(iv) *the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration*;

(v) *subject to subsection (2), the award contains decisions on matters beyond the scope of the submission to arbitration*;

(vi) *the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of [AA] from which the parties cannot derogate, or, failing such agreement, was not in accordance with [AA]*; *or*

(vii) *the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made*; *or*

(b) *if the High Court finds that*:

(i) *the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia*; *or*

(ii) *the award is in conflict with the public policy of Malaysia*. (Emphasis added.)

[65] As decided by Tengku Maimun CJ in the Federal Court case of *Siemens Industry Software GmbH & Co Kg (Germany) (formerly known as Innotec GmbH) v Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd) (M) & Ors* [2020] 3 MLJ 1, at [29], [37] and [53], all the procedural requirements to enforce the award have been fulfilled by SQA in respect of OS No 8.

[66] LH and LY have the onus to satisfy the court that OS No 8 should be refused due to the existence of any one of the grounds stated in s 39(1)(a)(i)–(vii), (b)(i) and (ii) of the AA — please refer to *Murray & Roberts Australia Pty Ltd v Earth Support Company (Sea) Sdn Bhd* [2015] MLJU 2319; [2015] 3 AMR 152, at [63] to [65]. Due to the reasons stated in the above Parts G(1) to G(5), I am not persuaded that LH and LY have discharged this burden.

H(1). Can court grant declarations under s 38(1) of the AA?

[67] Section 41 of the SRA and O 15 r 16 of the RC state as follows:

s 41 SRA *Discretion of court as to declaration of status or right*

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

O 15 r 16 RC *Declaratory judgment*

No action or other proceeding shall be open to objection merely on the ground that a declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed. (Emphasis added.)

[68] I am of the view that the court has no discretionary power pursuant to s 41 of the SRA and O 15 r 16 of the RC to grant a declaration that SQA was entitled to the two adjudicated amounts. This decision is premised on the following reasons:

(1) s 38(1) of the AA only confers power on the court to make either one of the two following orders ('two possible orders (s 38 of the AA)'):

(a) an order to recognise an arbitral award as binding and enforceable by entry as a judgment in terms of the arbitral award ('first possible

order (s 38 of the AA)'); *or*

(b) an order to enforce an arbitral award by way of a fresh action filed in court ('fresh suit') by a party in whose favour the arbitral award is made ('second possible order (s 38 of the AA)'). If a fresh suit is filed by SQA against LH and LY, SQA may pray for, among others, a declaratory order.

OS No 8 is not a fresh suit instituted by SQA against LH and LY for a court order to enforce the award. In other words, OS No 8 has not prayed for the second possible order (s 38 of the AA). As such, OS No 8:

(i) can only apply for the first possible order (s 38 of the AA); and

(ii) cannot apply for a declaration that SQA was entitled to the two adjudicated amounts as against LH and LY; and

(2) even if my interpretation of s 38(1) of the AA in the above sub-para (1) is erroneous and it is thus assumed that the court has a discretion under s 41 SRA read with O 15 r 16 of the RC to grant a declaration, I am not minded to exercise such a discretionary power because any declaration that SQA was entitled to the two adjudicated amounts would be contrary to:

(a) the judgment of our apex court in *Jack-In Pile* that CIPAA has no retrospective effect and cannot apply to the two contracts; and

(b) the Court of Appeal's decisions (two adjudication decisions) which have already set aside the High Court's decisions (two adjudication decisions) and two adjudication decisions.

H(2). Whether court can order LH and LR to pay two adjudicated amounts to SQA under s 38(1) of the AA

[69] As explained in the above sub-para 68(1):

(1) OS No 8 is not a fresh suit commenced by SQA against LH and LY for the second possible order (s 38 of the AA) which may include an order for LH and LY to pay the two adjudicated amounts to SQA; and

(2) OS No 8 can only apply for the first possible order (s of the 38). Consequently, the court cannot grant an order in OS No 8 for LH and LR to pay the two adjudicated amounts to SQA.

H(3). Can court's recognition of award under s 38(1) of the AA include arbitrator's decision (two adjudicated amounts)?

[70] In the light of:

(1) *Jack-In Pile*;

(2) the Court of Appeal's decisions (two adjudication decisions); and

(3) the arbitrator's decision (two adjudicated amounts);

(4) I accept the submission by SQA's learned counsel that it is only just for the court to make the first possible order (s 38) to include the arbitrator's decision (two adjudicated amounts). If otherwise:

(a) there will be an injustice to SQA because SQA had not been paid by LH and LY for works which formed the subject matter of the arbitrator's decision (two adjudicated amounts) ('works (two adjudicated amounts)'); and

(b) LH and LY would be unjustly enriched by way of evasion of payment to SQA with regard to the works (two adjudicated amounts).

H(4). Outcome of OS No 8

[71] Premised on the reasons explained in the above Parts H and H(1) to H(3), this court makes an order in OS No 8 that the award is recognized as binding and enforceable by entry as a judgment in terms of the award as follows, among others:

(1) LH and LY shall pay to SQA the following amounts:

(a) RM2,279,718.85 (after taking into account the payments of the two adjudicated amounts by LH and LY to SQA); and

(b) RM2,358,981.07 (the two adjudicated amounts which had been returned by SQA to LH and LY due to the effect of the Court of Appeal's decisions (two adjudication decisions)).

(2) LH and LY shall pay to SQA interest at the rate of 5%pa on the sum of RM2,279,718.85 from 26 September 2017 until the date of full payment of the same; and

(3) LH and LY shall pay to SQA interest at the rate of 5%pa on the amount of RM2,358,981.07 from 6 December 2022 until the date of full payment of the same.

I. OS NO 14

[72] After the delivery of the award, SQA's solicitors applied to the arbitrator by way of a letter dated 1 October 2021 (copied to the solicitors for LH and LY) for the arbitrator to tax the costs (arbitration) ('SQA's application for arbitrator's taxation (costs)').

[73] By way of a letter dated 4 October 2021, the solicitors for LH and LY objected strenuously to SQA's application for arbitrator's taxation (costs) ('objection to arbitrator's taxation (costs)'). The objection to arbitrator's taxation (costs) was based on the following grounds, among others:

(1) as the arbitrator had not taxed the costs (arbitration) in the award, the arbitrator was *functus officio* after the delivery of the award and could not tax the costs (arbitration) thereafter;

(2) SQA did not request the arbitrator to tax the costs (arbitration) within 30 days from SQA's receipt of the award as required by s 34(4) of the AA (I think the intention of the solicitors for LH and LY was to refer to s 35(4) of the AA and not s 34(4) of the AA); and

(3) OS No 8, OS No 9 and OS No 10 had already been filed on the date of SQA's application for arbitrator's taxation (costs). Consequently, SQA's application for arbitrator's taxation (costs) was an afterthought.

[74] The arbitrator responded to SQA's application for arbitrator's taxation (costs) and objection to arbitrator's taxation (costs) in a letter dated 7 October 2021 which stated as follows:

(1) as LH and LY had applied to the High Court to set aside the award, this would render 'impractical' the arbitrator's taxation of the costs (arbitration); and

(2) the arbitrator 'urged' the parties to apply to the High Court for a taxation of the costs (arbitration),

('arbitrator's refusal to tax costs (arbitration)').

I(1). Could arbitrator tax costs (arbitration) in this case?

[75] I reproduce below the relevant part of s 44 of the AA:

> s 44 *Costs* and expenses *of an arbitration*
>
> (1) *Unless otherwise agreed by the parties —*
>
> (a) *the costs* and expenses *of an arbitration shall be in the discretion of the arbitral tribunal who may —*
>
> (i) *direct to and by whom and in what manner those costs or any part thereof shall be paid*;
>
> (ii) *tax or settle the amount of such costs* and expenses; and
>
> (iii) award such costs and expenses to be paid as between solicitor and client;
>
> (b) *any party may apply to the High Court for the costs to be taxed where an*

arbitral tribunal has in its award directed that costs and expenses *be paid by any party, but fails to specify the amount of such costs* and expenses *within thirty days of having being requested to do so*; or

(c) each party shall be responsible for its own legal and other expenses and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration in the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration.

...

(5) *A taxation of costs*, fees and expenses *under this section may be reviewed in the same manner as a taxation of costs.* (Emphasis added.)

[76] I am of the following view:

(1) an arbitral tribunal has a statutory discretionary power to tax arbitration costs under s 44(1)(a)(ii) of the AA ('Arbitral Tribunal's taxation power (costs)');

(2) the only exception to the Arbitral Tribunal's taxation power (costs) is when the parties in the arbitration have agreed that the Arbitral Tribunal has no power to tax arbitration costs ('sole exception (Arbitral Tribunal's costs taxation power)'). The sole exception (Arbitral Tribunal's costs taxation power) is clear from the opening words in s 44(1) of the AA (unless otherwise agreed by the parties);

(3) in view of the sole exception (Arbitral Tribunal's costs taxation power) and the clear words in s 44(1)(a)(ii), the Arbitral Tribunal's taxation power (costs) is not affected in any manner if the parties in the arbitration have already filed any application under ss 37, 38 and/or 42 of the AA. If Parliament had intended for the Arbitral Tribunal's taxation power (costs) to be exercised before the filing of any application under ss 37, 38 and/or 42 of the AA, Parliament would have expressly stated as such in s 44(1) of the AA. The legislature however had deliberately omitted to do so; and

(4) the *functus officio* doctrine is provided by case law and is always subject to written law — please refer to *Dewani Design Sdn Bhd v Zhongji Construction Sdn Bhd and another case* [2022] MLJU 3171; [2023] 2 MLRH 84, at [35](1). It is thus clear that the case law doctrine of *functus officio* cannot override the will of the Legislature in s 44(1) of the AA which has provided for the Arbitral Tribunal's taxation power (costs) and sole exception (Arbitral Tribunal's costs taxation power). Accordingly, if parties to the arbitration agreement have not agreed that an arbitral tribunal cannot tax arbitration costs [ie, the sole exception (Arbitral Tribunal's costs taxation power) does not apply], the *functus officio* doctrine cannot bar the exercise of the Arbitral Tribunal's taxation power (costs). If otherwise, this will render nugatory the clear words of

Parliament in s 44(1)(a)(ii) of the AA.

[77] As explained in the above sub-para 76(3), notwithstanding the prior filing of OS No 8, OS No 9 and OS No 10, the arbitrator had the statutory discretion pursuant to s 44(1)(a)(ii) of the CA to tax the costs (arbitration).

[78] Despite the objection to arbitrator's taxation (costs), the case law doctrine of *functus officio* could not restrain the exercise of the arbitrator's statutory discretionary power under s 44(1)(a)(ii) of the CA to tax the costs (arbitration) — please refer to the above sub-para 76(4).

I(2). Court's power to determine arbitration costs

[79] The relevant part of s 35 of the AA reads as follows:

> 35(1) *Correction* and interpretation *of award* or additional award
>
> (1) *A party, within thirty days of the receipt of the award, unless any other period of time has been agreed upon by the parties —*
>
> (a) *upon notice to the other party, may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error or other error of similar nature*; or
>
> (b) upon notice to and with the agreement of the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.
>
> (2) *Where the arbitral tribunal considers the request made under subsection (1) to be justified, it shall make the correction* or give the interpretation within thirty days of the receipt of the request and such interpretation shall form part of the award.
>
> (3) *The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) on its own initiative within thirty days of the date of the award.*
>
> ...
>
> (6) *The arbitral tribunal may, where it thinks necessary, extend the period of time within which it shall make a correction*, interpretation or an additional award *under this section* ... (Emphasis added.)

[80] When an arbitral tribunal has directed a party ('R') to pay arbitration costs to another party ('S') but the arbitral tribunal has not specified the amount of arbitration costs, I am of the following opinion:

(1) any party, R and/or S, may apply to the High Court for a taxation of the arbitration costs pursuant to s 44(1)(b) of the AA ('court's taxation power (costs)');

(2) premised on the opening words in s 44(1) of the AA (unless otherwise agreed by the parties), there is only one exception to the court's taxation

power (costs), namely, when R and S have agreed that the court has no power to tax arbitration costs ('sole exception (court's taxation power)');

(3) in view of the sole exception (court's taxation power) and the clear provision in s 44(1)(b), the court's taxation power (costs) is not extinguished if an application under ss 37, 38 and/or 42 of the AA has/have already been filed by R and/or S; and

(4) s 35(1)(a) and (3) of the AA provide for, among others, the arbitral tribunal's power to correct an award in certain circumstances [please refer to paragraph 89 below]. The clear words in s 44(1)(b) do not disclose Parliament's intention for s 35 AA to be an exception to s 44(1)(b) AA. Hence, contrary to the submission of learned lead counsel for LH and LY, the court's taxation power (costs) pursuant to s 44(1)(b) of the AA cannot be curtailed in any manner by s 35(1)(a) and (3) of the AA.

I(3). Arbitrator should have taxed costs (arbitration)

[81] As between the Arbitral Tribunal's taxation power (costs) and the court's taxation power (costs), I am firmly of the view that as a general rule, the Arbitral Tribunal's taxation power (costs) (not the court's taxation power (costs)) should first be exercised. This opinion is premised on the following reasons:

(1) according to s 36(1) of the AA, an 'award' made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties to the arbitration agreement. The definition of 'award' in s 2(1) of the AA 'includes ... any award on costs'.

(2) upon the exercise of the Arbitral Tribunal's taxation power (costs):

(a) the arbitral tribunal's award on costs ('award (costs)') 'shall' be final pursuant to s 36(1) of the AA; and

(b) all parties in the arbitration have no right to appeal to the High Court against the award (costs);

(3) if the Arbitral Tribunal's taxation power (costs) is not invoked, the court's taxation power (costs) has to be resorted to. It is to be emphasized that the court's taxation power (costs) is not an optimal use of limited judicial resources. Furthermore, an exercise of Arbitral Tribunal's taxation power (costs) will save parties from expending valuable time, effort and expenses in the court's taxation power (costs); and

(4) as between an arbitral tribunal who has conducted the arbitral proceedings and the court, the arbitral tribunal is in a far better position than the court to tax arbitration costs. This is because the arbitral tribunal has first-hand knowledge of the arbitral proceedings which will greatly assist the arbitral tribunal's taxation of arbitration costs. On the other hand, the court has to start afresh the taxation of arbitration costs.

[82] In this case, despite the objection to arbitrator's taxation (costs), as explained in the above paragraph 81, the arbitrator should have taxed the costs (arbitration) under s 44(1)(a)(ii) of the AA. With respect to the arbitrator, the arbitrator's refusal to tax costs (arbitration) amounted to an abdication of the arbitrator's statutory discretionary power pursuant to s 44(1)(a)(ii) of the AA. Worse still, the arbitrator's refusal to tax costs (arbitration) had unnecessarily burdened the court to tax the costs (arbitration) under s 44(1)(b) of the AA. SQA had to expend much time, effort and legal fees to file and conduct OS No 14. For the sake of completeness, I do not accept the arbitrator's view in the arbitrator's refusal to tax costs (arbitration) that due to the fact that LH and LY had applied to the High Court to set aside the award, it was 'impractical' for the arbitrator to tax the costs (arbitration).

[83] In view of the reasons stated in the above para 81, unless the parties have agreed otherwise, it is my hope that as a general rule, an arbitral tribunal (not the court) should tax arbitration costs pursuant to s 44(1)(a)(ii) of the AA.

I(4). Effect of the RC

[84] When AA was enacted, the Rules of the High Court 1980 ('the RHC') were applicable. RHC provided for taxation of costs and review of taxation of costs. That is why s 44(5) of the AA provides for a review of taxation of costs. RHC were then replaced by the present RC. RC do not provide for taxation of costs and review of taxation of costs. Instead, RC provides for the court's power to 'determine' (not 'tax') costs. Accordingly, the term 'taxation' as provided in s 44 of the AA, in my view, means 'determination' of costs under RC.

I(5). Can SQA file OS No 14?

[85] Before I discuss the objections to OS No 14 which have been advanced by learned lead counsel for LH and LY, I wish to state that notwithstanding the prior filing of OS No 8, OS No 9 and OS No 10, SQA is entitled to institute OS No 14 — please refer to the above sub-para 80(3).

[86] Learned lead counsel for LH and LY has relied on the following grounds to persuade me to dismiss OS No 14:

(1) the arbitrator could not delegate to the court the arbitrator's discretionary power to tax the costs (arbitration);

(2) part of the award regarding the costs (arbitration) was ambiguous and consequently, the High Court could not the tax the costs (arbitration); and

(3) SQA should have applied to the arbitrator to tax the costs (arbitration) under s 35(1)(a) and (3) of the AA.

[87] Firstly, as explained in the above sub-para 80(1), the court has a statutory power to tax the costs (arbitration) under s 44(1)(b) of the AA. Such a power is conferred on the court by Parliament by way of s 44(1)(b) of the AA. Hence, there is no delegation of power to tax the costs (arbitration) from the arbitrator to the court. If I have accepted the above submission by learned counsel for LH and LY, this would have rendered redundant s 44(1)(b) of the AA.

[88] Secondly, sub-para N(3) award is clear that if parties could not agree on the costs (arbitration), the costs (arbitration) could be taxed by the court.

[89] Thirdly, I am of the view that LH and LY cannot rely on s 35 of the AA to oppose OS No 14. My reasons are as follows:

(1) s 35(1)(a) of the AA only applies when there exists any one or more of the following four errors in an arbitral award ('four errors'):

(a) there is an error in the award regarding the arbitral tribunal's computation;

(b) there exists a clerical error in the award;

(c) there is a typographical error in the award; and

(d) there exists in the award 'other error of similar nature' to a computational error, clerical error and typographical error.

In this case, the award did not contain the four errors;

(2) the 30 days period from the day of receipt of the award as stipulated in s 35(1) of the AA (30 days period), has long lapsed. There is no evidence in this case that LH, LY and SQA have agreed to extend the 30 days period. Nor is there evidence that the arbitrator had decided to extend the 30 days period under s 35(6) of the AA; and

(3) the arbitrator had not corrected any one of the four errors in the award on his own initiative within 30 days of the date of the award. There is therefore no room to invoke s 35(3) of the AA.

[90] Lastly, if I have accepted any one of the contentions advanced by learned counsel for LH and LY as stated in the above para 86:

(1) there will be an injustice to SQA as follows:

(a) the objection to arbitrator's taxation (costs) by LH and LY had led to the arbitrator's refusal to tax costs (arbitration). In other words, due to LH and LY, SQA could not have the arbitrator tax the costs (arbitration); and

(b) if OS No 14 is dismissed on any one of the grounds submitted by

learned lead counsel for LH and LY, SQA could not recover any amount of the costs (arbitration) despite being largely successful in the arbitration against LH and LY; and

(2) a dismissal of OS No 14 will render academic sub-para N(3) award and s 44(1)(b) of the AA.

I(6). Should Registrar tax costs (arbitration)?

[91] SQA's learned counsel has relied on O 59 r 12(1)(b) of the RC which states as follows:

> O 59 r 12 *Powers of Registrar to determine costs*
>
> (1) Subject to Order 59, rule 7, *the Registrar shall have power to determine —*
>
> ...
>
> (b) *the costs directed by an award made on a reference to arbitration under any written law or pursuant to an arbitration agreement to be paid*; ... (Emphasis added.)

[92] Notwithstanding O 59 r 12(1)(b) of the RC, I am of the view the court's taxation power (costs) should be done by a J/JC and not by the Registrar. This is because if the Registrar has taxed the costs (arbitration) pursuant to O 59 r 12(1)(b) of the RC ('registrar's taxation (costs)'), any party who is dissatisfied with the registrar's taxation (costs) may appeal to the J/JC under O 56 r 1(1) of the RC. However, if the court's taxation power (costs) is conducted by the J/JC:

(1) judicial time and effort need not be expended to hold the registrar's taxation (costs);

(2) there will be a saving of time, effort and expenses of all parties when the registrar's taxation (costs) is not conducted; and

(3) if there are applications filed under ss 37, 38 and 42 of the AA, all these three applications can be decided by the same J/JC together with the court's taxation power (costs) (as in this case). In this manner, there is an expeditious and economical disposal of all the four applications (as in this instance).

I(7). On what basis should court tax costs (arbitration)?

[93] In support of OS No 14, SQA's learned lead counsel has submitted as follows:

(1) reliance has been placed on O 59 r 17 of the RC; and

(2) costs (arbitration) should be taxed on an 'indemnity' basis according to the following cases:

(a) the judgment of Edgar Joseph Jr SCJ in the High Court case of *Teong Piling Co v Asia Insurance Co Ltd* [1994] 1 MLJ 444; and

(b) the decision of Douglas J in the Supreme Court of British Columbia (BC) in *Allard v University of British Columbia* 2021 BCSC 60.

[94] I reproduce below the relevant parts of O 59 rr 16 and 17 of the RC:

O 59 r 16 *Basis of assessment*

(1) *In assessing the costs payable in relation to any item, the Court shall have regard to all relevant circumstances, and in particular to —*

(a) *the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved*;

(b) *the skill, specialized knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel*;

(c) *the number and importance of the documents, however brief, prepared or perused*;

(d) the place and circumstances in which the business involved is transacted;

(e) *the importance of the cause or matter to the client*;

(f) *where* money or property *is involved, its amount or value*;

(g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.

(2) *Subject to the other provisions of these Rules, the amount of costs which any party are entitled to recover is the amount allowed after determination of costs on the standard basiswhere —*

(a) *an order is made that the costs of one party to proceedings be paid by another party to those proceedings*;

(b) an order is made for the payment of costs out of any fund; or

(c) no order for costs is required,

unless it appears to the Court to be appropriate to order costs to be determined on the indemnity basis.

(3) *On an assessment of costs on the standard basis, there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Court may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party; and in these Rules, the term 'the standard basis', in relation to the determination of costs, shall be construed accordingly*.

(4) *On a determination of costs on the indemnity basis, all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Court may have as to whether the costs were reasonably incurred or*

were reasonable in amount shall be resolved in favour of the receiving party; and in these Rules, the term 'the indemnity basis', in relation to the determination of costs, shall be construed accordingly.

(5) *Where the Court makes an order for costs without indicating the basis of determination of costs or an order that costs be determined on any basis other than the standard basis or the indemnity basis, the costs shall be determined on the standard basis*.

...

O 59 r 17 *Costs payable to a solicitor by his own client*

(1) This Rule is in amplification and not in derogation of the procedure set out in the Legal Profession Act 1976.

(2) *On the determination of a solicitor's bill to his own client (except a bill with respect to non-contentious business and a bill payable pursuant s 5 of the Legal Aid Act 1971), all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred.*

(3) *For the purpose of paragraph (1), all costs incurred with the express or implied approval of the client shall be conclusively presumed to have been reasonably incurred and, where the amount thereof has been expressly or impliedly approved by the client, to have been reasonable in amount*.

(4) In paragraph (3), references to the client shall be construed —

(a) if the client at the material time a mentally disordered person within the meaning of the Mental Health Act 2001 and was represented by a person acting as litigation representative, as references to that person acting, where necessary, with the authority of the Court; and

(b) if the client was at the material time a minor and represented by a person acting as litigation representative, as references to that person. (Emphasis added.)

[95] Firstly, O 59 r 17 of the RC applies to an assessment of costs payable by a client to the client's solicitor. In this case, sub-para N(3) award has clearly provided for a taxation of the costs (arbitration) on a 'party to party' basis and not on a 'solicitor-client' basis. Accordingly, I cannot accept SQA's reliance on O 59 r 17 of the RC to support OS No 14.

[96] Secondly, I have decided in *Ragawang Corporation Sdn Bhd v One Amerin Residence Sdn Bhd* [2020] MLJU 1141; [2020] 7 AMR 365, at [63], as follows:

[63] *As between litigating parties, it is clear from O 59 rr 16(2) to (5) and 21 RC that the court can only grant costs on a 'standard basis' or an 'indemnity basis' (not on a 'solicitor-client basis') ...* (Emphasis added.)

[97] Thirdly, I am of the following view regarding the basis for the court's taxation of arbitration costs under s 44(1)(b) of the AA:

(1) as a general rule, the court should exercise its discretion to tax arbitration costs on a standard basis pursuant to O 59 rr 16(2), (3) and (5) of the RC ('general rule (arbitration costs)') unless there is/are exceptional circumstance(s) for the court to tax costs on an indemnity basis under O 59 r 16(2) and (4) of the RC ('exception (arbitration costs)'); and

(2) if a party intends to invoke the exception (arbitration costs), that party has the burden to satisfy the court regarding the application of the exception (arbitration costs).

[98] Fourthly, the two cases cited by learned lead counsel for SQA can be distinguished from OS No 14 as follows:

(1) *Teong Piling* was decided based on RHC and before the advent of O 59 r 16(1) to (5) RC; and

(2) *Allard* concerned the application of the then applicable s 11 of BC's Arbitration Act RSBC 1996, c 55 ('AA (BC)') (now repealed by BC's Arbitration Act SBC 2020, c 2) and r 41 of BCICAC (British Columbia International Commercial Arbitration Center) Rules ('BCICAC Rules') which are materially different from our s 44(1)(b) AA and O 59 r 16(1)–(5) RC. I have to point out that the previous s 11(2)(a) AA (BC) and r 41(4)(c) BCICAC Rules have expressly allowed an arbitatir to consider 'actual reasonable legal fees' and 'legal and other expenses reasonably incurred in relation to the arbitration' respectively when the arbitrator determines arbitration costs.

[99] In this case, I am satisfied that the general rule (arbitration costs) should apply in the taxation of the costs (arbitration) because there were no exceptional circumstances to apply the exception (arbitration costs). In any event, SQA has not succeeded to discharge the onus to persuade the court to invoke the exception (arbitration costs) in this case.

I(8). Taxation of costs (arbitration) on a standard basis

[100] According to O 59 r 16(3) of the RC, SQA is entitled to 'a reasonable amount in respect of all costs reasonably incurred' by SQA in the arbitration ('reasonable sum (arbitration costs)').

[101] I am of the view that RM500,000 is a reasonable sum (arbitration costs) after taking into account the following relevant considerations:

(1) the arbitration involved difficult questions regarding construction contracts and matters — please refer to O 59 r 16(1)(a) of the RC;

(2) in the arbitration, SQA was represented by a senior and experienced counsel, Mr Lam Wai Loon — please see O 59 r 16(1)(b) of the RC;

(3) there are many documents which have been filed for the purpose of the arbitration — please refer to O 59 r 16(1)(c) of the RC;

(4) the arbitration was very important to SQA — please see O 59 r 16(1)(e) of the RC; and

(5) the arbitration concerned substantial amounts of claims (by LH and LY) and counterclaims (by SQA) — please refer to O 59 r 16(1)(f) of the RC.

[102] From the reasonable sum (arbitration costs) of RM500,000, this court exercises its discretion to make the following deduction:

(1) five issues (arbitration) were presented to the arbitrator who had decided two of the five issues (arbitration) in favour of LH and LY; and

(2) as LH and LY had succeeded at the arbitration regarding two of the five issues (arbitration), I deduct RM200,000 from the reasonable sum (arbitration costs), ie, SQA is only entitled to RM300,000 as costs (arbitration).

[103] By reason of O 59 r 24 RC, this court awards interest at the rate of 5%pa on RM300,000 from 6 December 2022 (date of the court's taxation of costs (arbitration)) until full payment of the same.

I(9). Leave of Court of Appeal is required for appeal against High Court's taxation of costs (arbitration)

[104] Before I conclude this judgment, I should point out that LH and LY have filed a notice of appeal against this court's taxation of costs (arbitration) without obtaining leave of the Court of Appeal as required by s 68(1)(c) of the Courts of Judicature Act 1964 ('the CJA'). Section 68(1)(c) of the CJA provides as follows:

> s 68 *Non-appealable matters.*
>
> (1) *No appeal shall be brought to the Court of Appeal in any of the following cases*:
>
> ...
>
> (c) *where the* judgment or *order relates to costs only which by law are left to the discretion of the Court, except with the leave of the Court of Appeal*; ... (Emphasis added.)

J. OUTCOME OF FOUR OS

[105] In summary:

(1) SQA's PO (OS No 9) is dismissed with costs to be paid by SQA to LH and LY;

A (2) both OS No 9 and OS No 10 are dismissed;

(3) OS No 8 is allowed with the order as stated in the above para 71;

(4) as OS No 8, OS No 9 and OS No 10 are heard together, one set of costs for OS No 8, OS No 9 and OS No 10 shall be paid by LH and LY to SQA; and

B

(5) OS No 14 is decided in the manner as stated in the above Part I(8).

C *SQA's PO dismissed with costs to be paid by SQA to LH and LY; OS Nos 9 and 10 dismissed; OS No 8 allowed with orders as stated in para 71 of judgment; court ordered one set of costs for OS Nos 8, 9 and 10; court decided OS No 14 in the manner stated in Part I(8) of judgment.*

Reported by Dzulqarnain Ab Fatar

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